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Supreme Court of the United States

OCTOBER TERM, 1966

No. H<sup>109</sup> 84

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OBED M. LASSEN, COMMISSIONER, STATE LAND  
DEPARTMENT, PETITIONER,

v.s.

ARIZONA, EX REL. ARIZONA  
HIGHWAY DEPARTMENT.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF ARIZONA

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PETITION FOR CERTIORARI FILED MARCH 11, 1966  
CERTIORARI GRANTED MAY 2, 1966

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1109

OBED M. LASSEN, COMMISSIONER, STATE LAND  
DEPARTMENT, PETITIONER,

vs.

ARIZONA, EX REL. ARIZONA  
HIGHWAY DEPARTMENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT

OF THE STATE OF ARIZONA

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Arizona

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[fol. 1]

**IN THE SUPREME COURT OF THE STATE  
OF ARIZONA**

No. 8620

**STATE OF ARIZONA, ex rel. ARIZONA  
HIGHWAY DEPARTMENT, Petitioner,**

vs.

**OBED M. LASSEN, Commissioner, STATE  
LAND DEPARTMENT, Respondent.**

**PETITION FOR WRIT OF PROHIBITION—Filed Dec. 14, 1964**

Petitioner, by and through its attorney, Robert W. Pickrell, The Attorney General, respectfully petitions this Court for a Writ of Prohibition staying further promulgation and/or enforcement by the respondent of Rules and Regulations Governing Rights of Way, November, 1964, a true copy of which is attached hereto as Exhibit "A", insofar as they purport to require the Petitioner to pay compensation for Rights of Way and Material Sites (see Rule 12 therein), and in support thereof states as follows:

**I**

The real parties in interest herein are the petitioner and the respondent.

**II**

This petition is brought before this court under its original jurisdiction as set forth in Art. 6, § 5, Constitution of Arizona, (as amended, November 8, 1960), and is brought initially in this court rather than in an inferior tribunal due to the nature of the controversy, the parties being two

[File endorsement omitted]

agencies of the state, and the need for an immediate clarification of a point of law, the certainty of which is essential to the continued operations of both the petitioner and respondent herein.

[fol. 2]

## III

On November 19, 1964, the respondent filed in the Office of the Secretary of the State of Arizona, a notice of adoption of rules, pursuant to A. R. S. § 41-1002.

## IV

Pursuant to said notice, your petitioner presented arguments, both orally and in writing at the hearing set by the respondent on December 14, 1964, at 10:00 o'clock A.M., advising him that under the law of this state he has no jurisdiction to do what he is attempting to do.

## V

The respondent rejected petitioner's petition and ordered that the rules be finally adopted and enforced as written.

## VI

While the Administrative Procedure Act, A. R. S. § 41-1001 et seq., provides that the validity of a rule may be tested by a declaratory judgment in the Superior Court of Maricopa County, A. R. S. § 41-1007A, it also specifically does not preclude other remedies for testing the validity of rules so promulgated (A. R. S. § 41-1007B). For the reasons and authority set forth more fully in the memorandum in support of this petition and attached hereto, in this situation, an action at law for declaratory relief could not be either speedy or adequate.

## VII

The relief sought by the petitioner is clearly within the jurisdiction of this court as appears in more detail in the memorandum of authorities attached hereto. Two decisions

of this court, which have not been overruled or modified by this court, or abridged by the legislature, clearly and unmistakably deny to the respondent the jurisdiction to require the State of Arizona, by and through its Highway [fol. 3] Department, to pay compensation to respondent for rights of way and material sites in and to land under his control and jurisdiction.

Wherefore, petitioner prays that this court issue an Alternative Writ of Prohibition to Stay all further promulgation or enforcement, either directly or indirectly, of the rules in question pending final determination of the jurisdictional question by this court, and that by such Alternative Writ, respondent be ordered to show cause why the Alternative Writ should not be made peremptory.

Dated this 14th day of December, 1964.

Respectfully submitted,

Robert W. Pickrell, The Attorney General; By:  
Gary K. Nelson, Assistant Attorney General,  
Attorneys for Petitioner.

*Duly sworn to by Gary K. Nelson, jurat omitted in printing.*

[fol. 4]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PETITIONER'S PETITION

This petition is brought in this court pursuant to its original jurisdiction as set forth in Art. 6, § 5, of the Arizona Constitution (as amended, November 8, 1960, Cumm. Supp., 1 A. R. S.). Paragraph 1 of Art. 6, § 5, supra, grants to this court original jurisdiction as to state officers in extraordinary writ proceedings.

It appearing that this petition might have been lawfully made to a lower court in the first instance, the petitioner

4

herein has set forth in its petition the circumstances indicating that it is proper for the writ sought to issue originally from this court pursuant to the requirements of Rule 1(b)1., Rules of the Supreme Court, 17 A. R. S.

The only decision of this court discovered by your petitioner which even remotely bears on this point of circumstances is *McCarrell v. Lane*, 76 Ariz. 67, 258 P. 2d 988. In that instance, the petitioner, a private citizen, sought and obtained in this court a writ of mandamus requiring the superintendent of motor vehicles to issue to him certificates of title to two new automobiles.

It does not appear that the matter of the circumstances justifying the original application for the writ in the Supreme Court, and the issuance of the same, was raised or discussed by the court. The same rule (Rules of the Supreme Court, Rule 11, par. 1, Code '39, Supp. 52), was in effect, however, and we must assume the court's rules were complied with and the circumstances considered sufficient. If this be the case, the facts of the matter at bar, in the opinion of your petitioner, are sufficient to justify this court in exercising its original jurisdiction. Two agencies of the state are involved; millions of public dollars and tens of thousands of acres of public lands will be affected; any delay in resolving this matter may result in curtailment of construction and irreparable damage by way of unmeasurable penalties; a decision of this court may need to be revisited, clarified, modified, or overruled in light of current circumstances.

The *McCarrell* case, supra, also is authority for the proposition that the judicial remedy set out in A. R. S. § 41-1007A, for a declaratory judgment of validity, may in a given case be inadequate to meet the ends of justice. Paragraph B of A. R. S. § 41-1007 indicates that our legislature also recognized this fact when it specifically indicated this remedy was not exclusive. Its inadequacy in this case is clear on the facts. The closing down of construction jobs, the loss of public funds in unnecessary penalties, the delay in providing adequate and safe highways for the traveling public, and the cost of possible rerouting, which might be forthcoming if this matter is caught up in protracted litiga-

tion, indicate that your petitioner has no plain, speedy and adequate remedy at law.

Prohibition is a proper remedy for the prevention of the usurpation or exercising by an inferior tribunal or officer jurisdiction with which they have not been vested by law. *Hislop v. Rodgers*, 54 Ariz. 101, 92 P. 2d 527; *Renck v. Superior Court of Maricopa County*, 66 Ariz. 320, 187 P. 2d 656.

In the case at bar, the respondent, State Land Commissioner, has clearly acted in excess of his jurisdiction in attempting by these amended rules to require the State of Arizona, by and through its highway department to pay compensation for rights of way and material sites granted from State Trust Lands. This court, in *State v. State Land Department*, 62 Ariz. 248, 156 P. 2d 901, and in *Grossetta v. Choate*, 51 Ariz. 248, 75 P. 2d 1031, held that the state could acquire for highway purposes lands held in trust under the enabling act and that no compensation needed to be paid therefor. The holdings are clear and unequivocal. Unless this court is persuaded to revisit these cases in light of the changed circumstances of nineteen years, or unless the cases can be interpreted so as to now allow the Respondent to exact this compensation, this court has no choice but to grant to petitioner the relief it seeks.

Dated this 14th day of December, 1964.

Respectfully submitted,

Robert W. Pickrell, The Attorney General, By:  
Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

[fol. 7]

EXHIBIT A TO PETITION

ARTICLE VIII, SUBCHAPTER B, CHAPTER II

RULES AND REGULATIONS

GOVERNING RIGHTS OF WAY

NOVEMBER, 1964

[fol. 8]

**INDEX****ARTICLE VIII, SUBCHAPTER B, CHAPTER II****RULES AND REGULATIONS****GOVERNING RIGHTS OF WAY**

NOVEMBER, 1964

**Rule 1:** Rules and Regulations Covered by this Article  
Apply only to Rights of Way of Material Sites

**Rule 2:** Definitions

**Rule 3:** Land Subject to Right of Way and Term

**Rule 4:** Application for Right of Way

**Rule 5:** Renewal Application for a Definite Right of Way

**Rule 6:** Rights of Surface and Subsurface Lessees

**Rule 7:** Rental

**Rule 8:** Form of Definite Right of Way and Provisions  
Thereof

**Rule 9:** Form of Indefinite Right of Way and Provisions  
Thereof

**Rule 10:** Granting of Indefinite Right of Way

**Rule 11:** Effect of a Right of Way

**Rule 12:** Rights of Way for State and County Highways  
and Material Sites

**Rule 13:** Applications for Rights of Way for State and  
County Highways and Material Sites

**Rule 14:** Form of Rights of Way for State and County  
Highways and Material Sites

**Rule 15:** Application Fees Excepting State and County  
and Material Site Rights of Way

Rule 16: Abandonment of Non-use of Highway Rights of Way or Material Sites; Transfer by State and County; Notice Thereof

Rule 17: Use of State Lands; Failure to Use

Rule 18: Applications to Assign Rights of Way

Rule 19: Fees

[fol. 9]

### RULE 1

**RULES AND REGULATIONS COVERED BY THIS ARTICLE APPLY ONLY TO RIGHTS OF WAY AND MATERIAL SITES.** The Rules and Regulations contained in this Article apply to Rights of Way and Material Sites only and the lands covered thereby.

### RULE 2

#### DEFINITIONS.

A "Right of Way" is a right of use and passage over State land for such purpose as the Commissioner may deem necessary.

A "Material Site" is an area granted for the purpose of entering and removing natural materials for highway construction purposes.

"Surface Lessee" means the holder of a lease on the surface of any State land for Grazing, Agricultural, Commercial, Homesite or Natural Products.

"Subsurface Lessee" means the holder of a lease on the subsurface of any State land for commercial purposes or for Oil, Gas, Mineral or Natural Products.

"Definite Right of Way" means a Right of Way granted for a definite period of years.

"Indefinite Right of Way" means a Right of Way granted for an indefinite period of time and for as long as Right of Way is used for the purpose granted and are of the following types:

TYPE (A): LAND MUST NOT BE FENCED. ANY OVERHEAD POLE LINE MUST PROVIDE THAT POLES WILL BE AT LEAST 100' APART, WHERE FEASIBLE. SURFACE OF THE LAND MUST BE AVAILABLE FOR USE BY OTHER SURFACE LESSEES. RIGHT OF WAY WIDTH MUST NOT EXCEED 30'.

TYPE (B): ANY INDEFINITE RIGHT OF WAY THAT DOES NOT QUALIFY UNDER TYPE (A).

### RULE 3

**LAND SUBJECT TO RIGHT OF WAY AND TERM.**  
All State lands may be subject to Right of Way easement for a term of not more than ten (10) years or for such lesser term as may be established by the Commissioner. Rights of Way may be granted for an indefinite period of time, so long as said Right of Way is used for the purpose granted.

No Right of Way will be granted where damage or injury to improvements owned by a surface or subsurface leaseholder would result unless compensation for the value of damage or injury to said improvements has first been determined and a settlement made.

[fol. 10]

### RULE 4

**APPLICATION FOR RIGHT OF WAY.** An application for a Right of Way shall be made on Application for Right of Way form provided by the State Land Department and in accordance with General Rules and Regulations relating to leasing of State lands.

The application shall be accompanied by a map showing in detail the survey of Rights of Way under application. The Commissioner reserves the right to require a survey to be made by a regularly licensed registered engineer or land surveyor at any time. The map need be of no particular scale, but should be of sufficiently large enough scale that improvements upon the surface of the land applied for may

be shown. The map is considered a part of the application for Right of Way as a line of definite location which will bind the applicant in the same manner as the Right of Way application itself to the statements made therein.

An application for Right of Way over or across State lands, the surface or subsurface of which is leased and in use, should be accompanied by a statement from such surface or subsurface lessee that he has no objections to the granting of the Right of Way, or, if such consent cannot be obtained, a statement from the applicant stating the reasons why such consent has not been obtained.

#### RULE 5

**RENEWAL APPLICATION FOR A DEFINITE RIGHT OF WAY.** Application for renewal of a definite Right of Way shall be made upon Land Department forms and in accordance with the General Rules and Regulations relating to State lands. If an applicant has not used the land for the purpose for which the initial Right of Way was granted him, he must state in detail the reasons therefor unless he has obtained from the Commissioner authorization in writing for such non-use as required by law and these Rules and Regulations.

#### RULE 6

**RIGHTS OF SURFACE AND SUBSURFACE LESSEES.** Under the law the Commissioner has the right to grant Rights of Way without the consent of the surface or subsurface lessee. In the event the Right of Way applicant and the surface or subsurface lessee are unable to arrive at the value of any improvements which may be injured or damaged by the granting of a Right of Way and the consent of the surface or subsurface lessee cannot be secured, the Commissioner may, if it is to the best interest of the State, appraise the improvements as provided by law and grant the Right of Way upon evidence of tender to the owner of improvements of the appraised value of

the same. The owner of the improvements may appeal from the appraisal of the improvements to the Board of Appeals of the Department as authorized by law and these Rules and Regulations.

In cases where to utilize the right of Way applied for it [fol. 11] is necessary to cut a fence belonging to the surface lessee or otherwise enter through a fence that is used to enclose or separate livestock, the installation of a standard cattle guard or other facilities, in accordance with such specifications as the Commissioner may prescribe, will be required by the Commissioner as a condition to the granting of the Right of Way applied for.

#### RULE 7

**RENTAL.** The annual rental for a Right of Way for not more than ten (10) years shall be at the appraised rental value.

**INDEFINITE RIGHT OF WAY FOR OTHER THAN HIGHWAY PURPOSES (FOR SO LONG AS USED FOR THE PURPOSE SPECIFIED) MAY BE GRANTED WITHOUT PUBLIC AUCTION AT THE APPRAISED RENTAL VALUE AS DETERMINED BY THE STATE LAND DEPARTMENT.**

**DEFINITE RIGHT OF WAY FOR A PERIOD IN EXCESS OF TEN (10) YEARS WILL BE GRANTED AT PUBLIC AUCTION TO THE HIGHEST BIDDER AT NOT LESS THAN THE APPRAISED RENTAL VALUE AS DETERMINED BY THE DEPARTMENT, AT WHICH PUBLIC AUCTION THE ANNUAL RENTAL WILL BE FIXED.**

#### RULE 8

**FORM OF DEFINITE RIGHT OF WAY AND PROVISIONS THEREOF.** The form of definite Right of Way offered by the Department to an applicant will be on Land

Department forms. The Right of Way will be subject to the provisions and supplemental conditions therein contained and such other conditions as may be added thereto and the provisions of law and these Rules and Regulations.

#### RULE 9

**FORM OF INDEFINITE RIGHT OF WAY AND PROVISIONS THEREOF.** An indefinite Right of Way will be prepared by the Department and will be subject to the provisions and conditions therein, and shall remain in force and effect so long as the Right of Way is used for the purposes stated therein.

#### RULE 10

**GRANTING OF INDEFINITE RIGHT OF WAY.** If the Commissioner should determine that a Right of Way for an indefinite period should be granted, he shall issue the same under terms and conditions he shall prescribe.

#### RULE 11

**EFFECT OF A RIGHT OF WAY.** A Right of Way held for a definite term neither creates nor establishes any right, title or interest in the holder thereof in and to the lands covered thereby, but shall be construed as merely a revocable license or permit.

[fol. 12] A Right of Way for an indefinite term confers upon the holder thereof a right to the use of such land for Right of Way purposes specified in his application and for as long a period as used for the purpose for which it was granted. The grant shall reserve to the State all oil, gas and mineral rights.

#### RULE 12

**RIGHTS OF WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES.** State and County highway Rights of Way and Material Sites may be granted

by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122.

#### RULE 13

**APPLICATIONS FOR RIGHT OF WAY FOR STATE AND COUNTY HIGHWAYS AND MATERIAL SITES.** Application for Right of Way and Material Sites for State and County highways shall be made upon Land Department forms.

#### RULE 14

**FORM OF RIGHT OF WAY FOR STATE AND COUNTY HIGHWAYS AND MATERIAL SITES.** The form of Right of Way offered by the Department to the State or County for highway purposes will be on Land Department forms and will be subject to the provisions and supplemental conditions therein contained and such other conditions as may be added thereto and the provisions of law and these Rules and Regulations.

The Commissioner reserves the right to limit the size, width and area of the Right of Way granted for State and County highway purposes to an area comparable to that obtained from private individuals for the same purpose.

#### RULE 15

**APPLICATION FEES EXCEPTING STATE AND COUNTY HIGHWAY AND MATERIAL SITE RIGHTS OF WAY.** No application fees will be charged the State or County applying for Right of Way for State and County highway and material site purposes.

**RULE 16**

**ABANDONMENT OF HIGHWAY RIGHTS OF WAY OR MATERIAL SITES; TRANSFER BY STATE AND COUNTY; NOTICE THEREOF.** Upon abandonment of highways or material sites, the Right of Way will terminate and the land will revert to its original status. All holders thereof shall notify the Commissioner within thirty (30) days from such abandonment.

In cases of a transfer from the State to a County, or from a County to the State, for highway or material site purposes, notice of such transfer shall be given to the Commissioner in writing within ninety (90) days from such transfer.

**RULE 17**

**USE OF STATE LANDS; FAILURE TO USE.** No holder of a Right of Way shall use lands under easement to him except for Right of Way purposes unless authorized by the Commissioner in writing.

Applications for a special use of lands under easement to a permittee for purposes other than Rights of Way shall be made in writing in triplicate, and shall state in detail the reasons for such use. The application shall be signed and verified as provided for in applications to lease. Upon approval of the application by the Commissioner, two copies of the application with the Commissioner's approval and any limitations to such approval endorsed by the Commissioner thereon will be returned by the Commissioner to the holder of the Right of Way, one copy thereof being retained in the files of the Department.

Failure of any permittee to use the land for the purpose for which he holds an easement or permit, without having been authorized to do so by the Commissioner in writing, may, in the discretion of the Commissioner, subject said easement or permit to forfeiture or to cancellation as provided by law and these Rules and Regulations.

**RULE 18**

**APPLICATIONS TO ASSIGN RIGHTS OF WAY.** Application to assign and an application for assumption of Right of Way and transfer shall be made upon Land Department forms and in accordance with the General Rules and Regulations relating to State lands. Upon approval of the application, the assignment of the Right of Way will be made by the Commissioner upon the permit where indicated and made of record in the Department.

**RULE 19****FEES.**

(1) Application for Right of Way .....	\$5.00
(2) Right of Way Issuance Fee .....	1.50
(3) Application for Transfer or Assignment of Right of Way .....	1.50
(4) Assignment of Right of Way .....	1.50

[fol. 14]

**NOTICE OF PROPOSED ADOPTION OF THE RULES OF THE STATE LAND DEPARTMENT  
(Agency, Board or Commission)**

Notice is hereby given that State Land Department,  
(Agency, Board or Commission)  
pursuant to the authority vested in it by Title 37, A.R.S.,  
(Code section authorizing adoption of proposed regulation)

proposes to repeal and adopt regulations as follows:  
(adopt, amend or repeal)

(1) Repeal Rules and Regulations Governing Rights of Way & Material Sites State Land Department.  
(Agency, Board or Commission)

(Here quote amended section or use informative summary or attach a copy)

(3) Adopt Rules and Regulations Governing Rights of Way & Material Sites State Land Department to read:  
(Agency, Board or Commission)

(Here quote new section or use informative summary or attach a copy)

See new Rules attached

Notice is given that any person interested in the proposed changes in said regulations may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the office of the State Land

(Agency, Board or Commission)

Department, Room 401, State Office Building, Phoenix, Arizona, at the hour of 10:00 AM on the 14th day of December, 1964.

Dated November 19, 1964

**STATE LAND DEPARTMENT**  
(Name of Agency)

/s/ OBED M. LASSEN  
(Signature of Office)

State Land Commissioner  
(Title of Officer)

(NOTE: At least twenty (20) days prior to the adoption of any rule, an original and two (2) copies of the notice of the proposed action shall be filed with the Secretary of State.)

[Last line of signature block omitted]

[fol. 15] *(Redacted) and seal of the State of Arizona (S)*  
**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**[Title omitted]**

**NOTICE OF HEARING ON PETITION FOR WRIT OF PROHIBITION**  
—Filed Dec. 14, 1964

To: The Above Named Respondent: Obed M. Lassen, State Land Commissioner, you will please take notice that on the 22d day of December, 1964, at the hour of 10 o'clock A.M., Petitioner through its attorney, will present to the Supreme Court of the State of Arizona, in the courtroom in the City of Phoenix, Arizona, a petition for a writ of prohibition, a copy of which is attached hereto and if said matter cannot be heard at said time and place, said petition will be presented to the court as soon hereafter as the same can be heard.

Robert W. Pickrell, The Attorney General; By:  
Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

**[File endorsement omitted]**

[fol. 16]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**[Title omitted]**

**ORDER SETTING TIME FOR HEARING PETITION FOR WRIT  
OF PROHIBITION—Filed Dec. 14, 1964**

It Is Hereby Ordered that the Petition for Writ of Prohibition filed herein be heard in the courtroom of the Supreme Court of Arizona on the 22d day of December, 1964, at the hour of 10 o'clock A. M.

Jesse A. Udall, Chief Justice.

**[File endorsement omitted]**

[fol. 17] To the Honorable Court of Appeals of the State of Arizona  
**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

[Title omitted]

**RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

—Filed Dec. 18, 1964

In response to the Petition for Writ of Prohibition herefore filed in this matter, the Respondent, OBED M. LASSEN, Commissioner, State Land Department, by and through ROBERT W. PICKRELL, the Attorney General, and DALE R. SHUMWAY, Special Assistant Attorney General, alleges as follows:

**I**

Admits the facts as set forth in Petitioner's petition and states there are no questions of fact to be determined in this matter.

**II**

In addition to the facts set forth in the petition, Respondent submits the following facts which are undisputed by the Petitioner:

1. That the lands under the jurisdiction of the State Land Commissioner were granted by the United States to the State of Arizona "in trust" by an Act of Congress;
2. That the Act of Congress specified subdivisions of the State of Arizona which would be the beneficiaries of the trust lands;
3. That for all the years since Arizona received these trust lands the Petitioner and other governmental bodies have applied for and received rights-of-way and material [fol. 18] sites without compensating the trust therefor;

[File endorsement omitted]

4. That the Enabling Act, the Constitution of Arizona, and the Statutes set up restrictions as to the administration and/or disposal of the trust lands.

### III

The remedy sought by the Petitioner is inappropriate for either of two reasons:

1. The decisions of this court do not prohibit the requirements set forth in the new rules promulgated by the Respondent, and
2. If, as contended by the Petitioner, two decisions of this court clearly and unmistakably deny to the Respondent the jurisdiction to require compensation for material sites and rights-of-way taken from lands under his jurisdiction, then this court should reexamine these cases in the light of the present requirements for these trust lands.

Wherefore, Respondent prays that the Alternative Writ of Prohibition be denied and this court allow Respondent to carry out his duties as trustee as indicated by the new rules.

Respectfully submitted this 18th day of December, 1964.

Robert W. Pickrell, The Attorney General; Dale R. Shumway, Special Assistant Attorney General.

[fol. 19] *Duly Sworn to by Obed M. Lassen, jurat omitted in printing.*

[fol. 20]

#### MEMORANDUM OF POINTS AND AUTHORITY

On December 14, 1964 the State Land Department adopted Rules and Regulations Governing Rights-of-Way. These rules and regulations were an amendment to rules previously in force. Rule 12 of these rules states:

“RIGHTS-OF-WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES. State and County Highway rights-of-way and material sites may be granted by the Depart-

ment for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in ARS-12-1122."

It is the position of the Respondent that this rule is necessary to carry out the duties imposed upon him by the Enabling Act, by the Constitution, and by the Statutes governing State trust lands. The Petition for Writ of Prohibition filed by the Arizona Highway Department seeks to prohibit enforcement of this rule.

There is a mistaken notion in the minds of a great majority of both citizens and the government officials of the State of Arizona as to the nature of the lands administered by the Respondent. So that this court may be aware of the nature of these lands, it is necessary to refer to the Enabling Act in Vol. 1, *Arizona Revised Statutes*, p. 79. Section 24 of this Act grants Sections 2, 16, 32 and 36 of each Township to the State "in trust" for the support of the common schools. Section 25 sets out certain grants of a specified acreage "in trust" for each of several purposes, including university, legislative, executive and judicial public buildings, penitentiary, insane asylum, etc. Section 28 of this Act provides for the administration and disposal of the above lands. It states:

"... all lands hereby granted, including those which, having been heretofore granted ... shall be by the said State held in trust, to be disposed of ... only in manner [fol. 21] as herein provided ..., and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, ... in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

"... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction ... notice of which public auction shall first have been duly given by advertisement, ... nor shall any sale or contract for the sale of ... natural products of such lands be made save ... after the notice by publication provided for sales and leases of lands themselves.

"Every sale, lease, conveyance, or contract of ... any of the lands ... or the use thereof or the natural products ... not made on substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the State to the contrary notwithstanding ... "

The State of Arizona accepted the lands conveyed by the above sections of the Enabling Act and agreed to hold them "in trust" for the purposes specified by the United States Congress. See Art. 10, Sec. 1, *Constitution of Arizona*.

The State of Arizona further agreed to hold the land and/or dispose of the lands or products from the lands in accordance with the restrictions set forth in the Enabling Act. See Art. 10, Sections 2 through 11, *Constitution of Arizona*.

Since the time that these lands were granted in trust to the State of Arizona, rights-of-way and material sites have been granted to the Arizona Highway Department and Counties of the State without advertising, public auction, and without requiring that compensation be paid for the same. This practice has not gone uncontested by previous Land Commissioners.

In 1938 the Pima County Board of Supervisors sought to create a highway over and across certain State lands held in trust. The lower court held that the establishment of such highway was null and void. Our Supreme Court in *Grosetta v. Choate*, 51 Ariz. 248; 75 P 2d 1031, reversed the lower [fol. 22] court, stating,

"We think the restrictions in the grant of such lands, as to their disposition or use by the State were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions."

This decision was affirmed by our court in *State of Arizona v. State Land Department*, 62 Ariz 248; 156 P. 2d 901. This case was brought seeking declaratory judgment as to the effectiveness of the Land Commissioner's order that all easements and permits theretofore issued to the State Highway Department would be surrendered and that such permits for easements or material sites would be reissued as leases. The Commissioner further ordered that payment would be made for both easements and material sites. The court holding against the order of the State Land Commissioner upheld the language in the *Grosetta* case.

These Arizona decisions relied heavily for their reasoning upon *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433; 222 P. 3, 5. This case was decided many years ago by the Wyoming court under a set of facts which was considerably different from the facts now existent in Arizona. At the time of that case, highway systems were opening up a vast frontier and it was conceivable that such opening up of the frontier by roadways cast a great benefit on the trust lands of the State of Wyoming. Language from *Ross v. Trustees of the University of Wyoming*, supra was quoted in both *Grosetta v. Choate*, supra and *State of Arizona v. State Land Department*, supra. In the latter case this court stated, quoting from the *Ross* case,

"... unless such object or purpose is found to have become substantially impaired through granting a right-of-way for a county or public road, neither the Act of the State making the grant nor the Statute authorizing it should be held a violation of the trust [fol. 23] upon which the land is held or of the constitu-

tional restrictions upon its disposal." (Emphasis supplied)

This language adopted by this court clearly implies that compensation will not be required unless the object or purpose of the trust is substantially impaired.

Highway construction in a growing state like ours has become a large and expanding operation requiring large tracts of land for rights-of-way and material site purposes. Many of the rights-of-way and all of the material sites heretofore granted have no beneficial effect on the trust lands. In many cases the Petitioner, in his application for a right-of-way, requires that his right-of-way be exclusive for the construction of a "controlled access" highway. In some cases, trust lands are then completely surrounded either by the right-of-way taken or by private lands. Certainly, such a grant substantially impairs the object or purpose of the trust.

In cases where land is obtained for material site purposes, such land is often excavated to a depth of from ten to forty feet, leaving only the subsoil, an area which suffers continuing erosion. In any event, that area of the trust land is rendered practically useless for the purpose of the trust.

It is the Respondent's position that these uses of the trust lands of the State of Arizona substantially impair the purpose for which these lands were granted to the State of Arizona and that, consistent with this court's holding in *State of Arizona v. State Land Department*, supra the new rules promulgated by the State Land Commissioner are valid and enforceable by this court.

If this court should find that its ruling in *State of Arizona v. State Land Department*, supra prohibits enforcement of the rules adopted by the State Land Commissioner, then we submit that that case should be reexamined.

[fol. 24] The New Mexico Supreme Court as recently as 1956 examined the problem that is now before this court. In *State v. Walker*, 61 N.M. 374; 301 P 2d 317 the court held

that the Commissioner of Public Lands of New Mexico could charge the State Highway Commission of New Mexico for rights-of-way and material sites used in the construction of highways. It is well to note that the Enabling Act of New Mexico is identical to that of Arizona.

Section 28 of the Enabling Act and Art. 10, Sec. 2, Constitution of Arizona, provides that disposition of any trust lands or of any money or thing of value directly or indirectly derived from the lands in any manner in non-conformance with the provisions of the Enabling Act shall be deemed a breach of trust and shall be null and void. In view of these two provisions, the Respondent submits that the rule which he has adopted is necessary to carry out the intent of the Congress of the United States, that the law in Arizona does not prohibit the adoption of the rule, and that the Writ of Prohibition should not be granted.

Respectfully submitted,

Robert W. Pickrell, The Attorney General, Dale R. Shumway, Special Assistant Attorney General.

Copy of the foregoing Response and Memorandum delivered this 18th day of December, 1964 to:

Gary K. Nelson, Assistant Attorney General, Arizona Highway Department, 206 South 17th Avenue, Phoenix, Arizona.

[fol. 25] Acceptance of Service (omitted in printing).

[fol. 26]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA****STATE OF ARIZONA, et rel.**  
**ARIZONA HIGHWAY DEPARTMENT, Petitioner,****vs.****OBED M. LASSEN, Commissioner,**  
**STATE LAND DEPARTMENT, Respondent.****ORDER GRANTING ALTERNATIVE WRIT OF PROHIBITION AND  
DIRECTING ISSUANCE THEREON—December 22, 1964**

Upon reading and filing herein the verified petition of the State of Arizona, ex rel., the Arizona Highway Department, for a Writ of Prohibition to be issued by this court to the respondent Obed M. Lassen, the State Land Commissioner, on the ground that said respondent is in excess of his jurisdiction in the promulgation and enforcement of certain rules directly applicable to the petitioner and it appearing from said petition that the writ therein prayed for should be issued;

It Is Therefore Ordered that a writ issue out of and under the seal of this court addressed to the respondent, Obed M. Lassen, as State Land Commissioner, commanding said respondent to desist and refrain from any further promulgation or enforcement, either directly or indirectly of the rules as specified in the petition herein until the further order of this court thereon, and to show cause before this court at the Supreme Court, in the City of Phoenix, County of Maricopa, State of Arizona, on the 8th day of March, 1965, why the said respondent should not be absolutely restrained from any further action to promulgate or enforce said rules in question.

Dated this 22nd day of December, 1964.

Jesse A. Udall, Chief Justice of the Supreme Court.

[File endorsement omitted]

[fol. 27] **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**STATE OF ARIZONA, ex rel.**  
**ARIZONA HIGHWAY DEPARTMENT, Petitioner,**

vs.

**OBED M. LASSEN, Commissioner,**  
**STATE LAND DEPARTMENT, Respondent.**

**ALTERNATIVE WRIT OF PROHIBITION—December 22, 1964**

The State of Arizona to Obed M. Lassen, State Land Commissioner of Arizona, Greetings:

Whereas, it has been made to appear to this court by the verified petition of the State of Arizona, ex rel., the Arizona Highway Department, that you are exceeding your jurisdiction by proceeding to promulgate and enforce certain rules which would require the said petitioner to compensate you for state lands granted to petitioner for rights of way and material sites, and it further appearing that the law of the state strictly prohibits you from so doing:

Nevertheless, you, the said State Land Commissioner, Obed M. Lassen, as it is alleged, have proceeded to promulgate and are about to enforce said rules to the manifest injury and damage to said petitioner.

We, therefore, being willing that the laws and customs of our said state should be observed, and that our good and faithful citizens should in no wise be approved, we command you, said Land Commissioner, that you desist and refrain from any further promulgation or enforcement, either directly or indirectly, as of those certain rules specified in the petition and herein until further order of this court thereon, and that on the 8th day of March, 1965, you [fol. 28] show cause, before our court, why you should not

[File endorsement omitted]

be absolutely restrained from any further action to promulgate or enforce said rules in question. And have you then and there this writ.

Witness the Honorable Chief Justice of the Supreme Court for the State of Arizona, this 22d day of December, 1964.

Sylvia Hawkinson, Clerk.

[fol. 40]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

PETITIONER'S OPENING MEMORANDUM IN SUPPORT OF THE  
ALTERNATIVE WRIT OF PROHIBITION BEING MADE PERMANENT—Filed January 13, 1965

Comes Now your petitioner, by and through its attorneys undersigned, and presents herein its opening memorandum in support of the alternative writ of prohibition heretofore issued by this court on December 22, 1964. Your petitioner incorporates by reference the memoranda of both petitioner and respondent which have heretofore been filed in this cause and will make every effort to avoid repetition.

Question Presented

The alternative writ of prohibition having been heretofore issued in this cause, the sole issue presently before the court is whether the Respondent State Land Commissioner has jurisdiction to exact compensation from the petitioner for rights of way and material sites granted to it from the "Trust" lands granted to the state by virtue of the Enabling Act. Even should this court answer this question in the affirmative, your petitioner prays that the court clearly indicate that this is the total scope of any decision in this case. Any further action indicating the court's ap-

[File endorsement omitted]

proval or disapproval of any particular method of exacting the compensation or in determining its amount would be outside the issues as presented in this cause. It is for this reason that your petitioner has not raised the propriety of using A. R. S. § 12-1122, to determine the amount of the compensation. Indeed, the petitioner has grave doubts as to [fol. 41] this particular method of valuation being totally acceptable. This problem, however, together with many others concerning the actual mechanics of collecting these monies, should this court decide the Land Commissioner does have jurisdiction, must be left to the executive and legislative branches to work out initially, subject to the normal and routine procedures of judicial review.

### Argument

There can be no real question but that the law as presently constituted in this area by the decisions of the court in *Grosetta v. Choate*, 51 Ariz. 248, 75 P. 2d 1031, and *State v. State Land Department*, 62 Ariz. 248, 156 P. 2d 901, denies the respondent the jurisdiction to do what he has attempted to do. What the court must now decide is whether the decisions referred to above, and particularly as to *State v. State Land Department*, were sound at the time they were rendered, and are still proper expositions of the law as it should be today in Arizona.

Your petitioner cannot, in all candor, urge upon this court the proposition that *State v. State Land Department*, supra, should be the final and last word on this vital problem. While seemingly indicating a possible exception to its final decision (see quote set forth on page 3 of Respondent's initial memorandum of points and authorities) the court's ultimate decision is total, unequivocal, and without exception:

"The judgment of the superior court is reversed and it is hereby ordered, adjudged and decreed that the state land department and the state land commissioner are not entitled to collect, or receive and that the State of

Arizona is not required to pay, any purchase price, rental, royalty or other charge for the taking or use of school and institutional lands or the natural products thereof for the establishment, construction, maintenance or repair of state highways.

"It is further ordered, adjudged and decreed that the state land department and the state land commissioner [fol. 42] be, and he is hereby required, to issue to the state of Arizona on proper application such permits as are expedient and necessary in enabling the state and its agency, the Arizona Highway Department and the state highway engineer to carry out its function and duties with respect to the administration of state highways within the state." 62 Ariz. at 255 and 256.

The petitioner has serious doubts as to whether such an absolute position is in literal accord with the applicable provisions of the Enabling Act. The decision in *Murphy v. State*, 65 Ariz. 338, 181 P. 2d 336, analyzes in great detail Section 28 of our Enabling Act. Fully thirty-one pages of 65 Ariz. are devoted to this opinion. Rather than attempt to excise any particular portion of this lengthy, but illuminating opinion, the court is referred to it as being a more carefully considered analysis of that portion of our Enabling Act here in question. It is interesting to note, moreover, that our court in *Murphy*, supra, quotes extensively from *United States v. Ervien*, 246 F. 277, 159 C.C.A. 7, affirmed 251 U. S. 41, 40 S. Ct. 75, 64 L. Ed. 128, which is the very case heavily relied upon by the New Mexico court in both discounting *State v. State Land Department*, supra, and in holding it proper for their land commissioner to charge their highway department for rights of way and material sites granted from "Trust Lands". *State v. Walker*, 61 N. M. 374, 301 P. 2d 317.

While the reasoning of the New Mexico court in *Walker*, supra, cannot be ignored, it is interesting to note the parties to the case they basically rely on, *United States v. Ervien*, supra. The fact that the United States was the party seek-

ing relief in that case is extremely significant. In the next to the last paragraph of Section 28 of our Enabling Act, 1 A. R. S. 91, we find these words:

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United [fol. 43] States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

We need look no further than *United States v. Ervien* for an example of the Attorney General of the United States fulfilling that duty.

If it be conceded for the moment that the respondent's position is correct, i.e. that granting of free rights of way and material sites to the state and counties for highway purposes is a violation of our Enabling Act, then it must follow that the Attorney General of the United States has not fulfilled his duty in this area. Although there are presently no facts before the court concerning whether the Attorney General of the United States has been requested to take action, it must be presumed in the light of the long standing effect of this court's decision in *State v. State Land Department*, *supra*, and the history of this conflict in New Mexico, finally culminating in *State v. Walker*, *supra*, that the Justice Department was and is aware of what is being done.

This court has said on many occasions that public officials are presumed to do their duty. *Hunt v. Campbell*, 19 Ariz. 254, 169 P. 596; *Verdi Water and Power Co. v. Salt River Valley Water Users' Ass'n*, 22 Ariz. 305, 197 P. 227, cert. denied 257 U. S. 643, 42 S. Ct. 53, 66 L. Ed. 412; *Covington v. Basich Bros. Const. Co.*, 72 Ariz. 280, 233 P. 2d 837; and many others. Are we now to depart from this long standing doctrine and presume the contrary? It would seem that the answer to this question must be no. "It must be pre-

sumed that the Attorney General's failure to act, either by request or on his own initiative, is due to the fact that this court's decision in *State v. State Land Department*, supra, is a correct and acceptable interpretation of the Enabling Act."

[fol. 44] This court's position as to compensation in *State v. State Land Department*, supra, bolstered as it is by the long continued acquiescence and inaction by the Federal Authorities specifically charged by law with the responsibility for enforcement of the Enabling Act, is certainly no more a departure from the letter and spirit of the Enabling Act than the proposition that the advertising and public auction provisions of Section 28 of the Enabling Act are inapplicable to these grants to the state for rights of way and material sites. This latter proposition was answered by our court in *Grosetta v. Choate*, supra, reaffirmed in *State v. State Land Department*, supra, and completely accepted by the New Mexico court, almost as an afterthought, in *State v. Walker*, supra, 301 P. 2d at p. 322.

For the reasons heretofore stated, the alternative writ should be made permanent.

Dated this 19th day of January, 1965.

Respectfully submitted,

Darrell F. Smith, The Attorney General, By: Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner.

Copy of the foregoing mailed this 19th day of January, 1965 to:

Dale R. Shumway, Attorney for Respondent, State Land Department, 400 State Office Building, Phoenix, Arizona 85007.

Rex E. Lee, Jennings, Strouss, Salmon & Trask, Attorneys for Salt River Project as Amicus Curiae, 6th Floor, Title & Trust Building, Phoenix, Arizona, Gary K. Nelson.

[fol. 45]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

[Title omitted]

**STIPULATION AND ORDER EXTENDING TIME TO FILE  
REPLY MEMORANDUM—February 19, 1965**

It Is Hereby Stipulated by and between the counsel for the respective parties that the respondent may have until March 15, 1965 in which to submit their reply memorandum in opposition to the Alternative Writ of Prohibition being made permanent.

Dated: February 19, 1965

Dale R. Shumway, Special Assistant Attorney General.

Dale R. Shumway, Attorney for Respondent.

Gary K. Nelson, Assistant Attorney General.

Gary K. Nelson, Attorney for Petitioner.

[fol. 46]

**Order**

Pursuant to the foregoing stipulation, It Is Ordered that the respondent may have until March 15, 1965 in which to submit reply memorandum in opposition to the Alternative Writ of Prohibition being made permanent.

Dated: February 19, 1965.

Lorna E. Lockwood, Chief Justice.

[File endorsement omitted]

[File endorsement omitted]  
[File endorsement omitted]

[fol. 54]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

[Title omitted]

**WAIVER OF FURTHER REPLY MEMORANDUM—**

Filed April 1, 1965

Comes Now the Petitioner, by and through its attorneys undersigned, and hereby waive the filing of any further memorandum as provided for by the order of this Court. All matters necessary for the determination of this cause have been exhaustively presented by the briefs and arguments heretofore presented and filed in this case.

Respectfully submitted,

Darrell F. Smith, The Attorney General, By: Gary K. Nelson, Assistant Attorney General, Attorneys for Petitioner, 159 Capitol Building, Phoenix, Arizona.

Copy of the foregoing mailed this 1st day of April, 1965  
to:

Dale R. Shumway, Special Assistant Attorney General, Attorney for Respondent, 400 State Office Building, Phoenix, Arizona 85041.

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts, Nos. 3 and 4, Pinal County, Suite 733, Security Building, Phoenix, Arizona.

[fol. 55] A. Van Wagenen, Jr., Attorney for Electrical Districts, Nos. 2 and 5, Pinal County, 85 North Country Club Drive, Phoenix, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Westover, Copple Keddie & Choules, Attorneys for Welton Mohawk, Irrigation & Drainage, District of Yuma, Yuma, Arizona.

[File endorsement omitted]

Richard J. Riley, County Attorney, Cochise County,  
Bisbee, Arizona.

Jennings, Strouss, Salmon & Trask, J. A. Riggins, Jr.,  
Rex E. Lee, Attorneys for Salt River Project, Improvement  
and Agricultural District, 6th Floor, Title & Trust Building,  
Phoenix, Arizona.

By: Gary K. Nelson, Assistant Attorney General, 159  
Capitol Building, Phoenix, Arizona.

[fol. 61]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

No. 8620

THE STATE OF ARIZONA, ex rel.

ARIZONA HIGHWAY DEPARTMENT, Petitioner,

v.

OBED M. LASSEN, Commissioner,  
STATE LAND DEPARTMENT, Respondent.

Alternative Writ of Prohibition Heretofore  
Issued Made Permanent

Darrell F. Smith, The Attorney General, Robert W.  
Pickrell, former Attorney General, Gary K. Nelson,  
Assistant Attorney General, Attorneys for Peti-  
tioner.

Dale R. Shumway, Special Assistant Attorney General,  
Attorney for Respondent.

Rex E. Lee, Jennings, Strouss, Salmon & Trask, At-  
torneys for Salt River Project Agri. Improvement  
District;

[File endorsement omitted]

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts Nos. 3 & 4, Pinal County;

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 & 5, Pinal County;

E. Leigh Larson, County Attorney, Santa Cruz County;

Westover, Copple, Keddie & Choules, Attorneys for Welton Mohawk Irrigation & Drainage District;

Richard J. Riley, County Attorney for Cochise County, Attorneys for Amici Curiae.

OPINION—Filed November 12, 1965

McFarland, Justice:

For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579.

[fol. 62] On December 14, 1964, the State Land Commissioner, hereinafter designated as Land Commissioner or respondent, after giving notice of a proposal to change the rules and regulations governing the rights of way and material sites over these lands, and holding a hearing at which petitioner appeared and filed an objection thereto, adopted the following rule designated as Rule No. 12 of the State Land Department, to-wit:

"State and County highway Rights-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in ARS 12-1122."

Objections were overruled. On the same day, the State Highway Department, hereinafter designated as the Department or petitioner, filed this writ of prohibition to prevent respondent from enforcing this rule. An alternative writ of prohibition was granted by this court.

The question presented in this case is whether the Land Commissioner has the authority to adopt the rule as set forth which, in effect, provides for the payment for rights of way and material sites over these trust lands by the petitioner.

The lands were granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910. Under Sec. 24 of this act, the State was granted "in trust," certain sections of every township for the support of common schools, with the opportunity to make indemnity selections where any of the sections were lost for one or more reasons. Congress further provided, in Sec. 25 of the Enabling Act, twelve specific grants for the following purposes: university; legislative, executive and judicial, public buildings; penitentiaries; insane asylum; school and asylum for deaf, dumb and blind; miners' hospital; normal schools; state charitable, penal and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutions; and county bonds. By Sec. 1, Art. 10, of the Constitution of Arizona, the people of Arizona accepted the terms of the Enabling Act.

#### "§ 1. Acceptance and holding of lands by state in trust

"Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified

in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Respondent claims it has this authority under Section 28 of the Enabling Act, which sets forth the rules for the administration and disposition of the "trust lands" confirmed to the State of Arizona under Sec. 24 and Sec. 25. Section 28 provides, in part:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in [fol. 64] any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

• • • • •

"... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction ...

• • • • •

"... nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves ...

• • • • •

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed . . .

" . . . It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

It is the contention of the respondent that, under the terms of these rules, it is a breach of trust to allow the petitioner to use the "trust lands" without compensating the trust fund for the use thereof.

This question has been before this court on two prior occasions—the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031, and the case of *State v. State Land Department*, 62 Ariz. 248, 156 P.2d 901. In *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, the late Justice LaPrade set forth an able and scholarly history of the Enabling Act. We see no reason for trying to add to the history of this act. In [fol. 65] the case of *State v. State Land Department*, supra, we said:

"The holding of this court in the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 Pac. (2d) 1031, substantially determines all the issues herein involved. In that case, we reviewed an order of the trial court holding that the establishment of a county highway over school land was void because the land was held in trust under the Enabling Act, and that the granting of a right-of-way

thereover to a county was a violation of the Act. The judgment of the lower court was reversed, the holding being that the land department could grant a right-of-way for public highways over school land to the several counties since the Enabling Act does not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways.

"This decision was predicated on an interpretation of Section 11-601, Arizona Code Annotated 1939. This section of the code, together with the provisions contained in Sections 11-1001, 11-1002 and 11-1003, were all enacted at the same time. See Laws of 1915 (2nd S.S.). Sections 11-1001, 11-1002 and 11-1003 were in effect at the time of the opinion and judgment in the case of *Grossetta v. Choate, Supra*. The holding in the *Grossetta v. Choate, supra*, case was predicated not only on the statutory provisions of Section 11-601, but also considered the restrictions of the grant in the Enabling Act.

"It is the contention of the land commissioner that this court in the *Grossetta* case did not pass on the question of whether such rights-of-way may be granted without compensation to the permanent fund to which he contends the lands are attached or belong.

"In the *Grossetta* case we cited the case of *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, and from a very lengthy opinion rendered on petition for rehearing in that case (31 Wyo. 464, 228 Pac. 642, 647), we quote with approval a portion of the opinion as applicable to the question under consideration:

"The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and main-

taining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a [fol. 66] fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held, or of the constitutional restrictions upon its disposal. For the natural tendency of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.'

"It is true that in the Grossetta case, the court did not in terms pass on the question of whether under Section 11-1001, *supra*, easements for highways could be granted over these lands without compensation. It is evident, however, that this court in the Grossetta case had in mind the undoubted right of the state to provide for public highways, and if such highway was for a wholly public purpose, the right of the state to use such school or institutional lands for highway rights-of-way without compensation is inferred." 62 Ariz. at 253, 156 P.2d at 903

The Land Commissioner, in his brief, contends that this court should follow the decision of the Supreme Court of New Mexico in the case of State v. Walker, 61 N.M. 374, 301 P.2d 317, rather than our own decisions, for the reason that the Enabling Acts for each state were identical. We are of the opinion that the holdings in the case of State of Arizona v. State Land Department, *supra*, and Grossetta v. Choate, *supra*, are sound, and see no reason for departing from these decisions.

The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived

of anything of value. It is well known that good highways throughout a state increase the value of the lands. These lands are located throughout the state. The Land Commissioner, in his memorandum, sets forth what he states to be a fair value for these rights of way. He does not give the basis of the value, nor was it based upon evidence submitted in the case. Certainly, if the highways had not been established [fol. 67] the values of these lands would have been much less. Nor does he state whether the values estimated are those when the easements were first granted or as of the present time, after the values have been enhanced by the building of a highway system throughout this state.

This court, in the State Land case (Conway), *supra*, made two fundamental determinations:

1. It was held that as a matter of law the grant of non-  
rental rights of way for the purpose of constructing the  
kind of roads involved in that case resulted in an over-all  
benefit to school trust lands.
2. It was held that where there is such a benefit the  
State Land Department must grant the requested rights of  
way free of charge.

We certainly agree that, in making a determination as to whether the proposed construction would result in an over-all benefit to trust lands, such determination must be made upon all of the trust lands as a whole, rather than taking them parcel by parcel. The Land Commissioner, in his memorandum, asked the question: If highway construction by states and counties improves the lands that the highways cross, why, then, is it ever necessary for compensation to be paid to a private land owner when his land is taken? Private lands are in a different category from these trust lands. Private lands are in relatively small tracts, and the value of the right of way to the owner is frequently out of proportion to the benefit to him, while, as we have held, the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an over-all benefit to the trust lands as a whole.

The value of these large tracts of trust lands is greatly enhanced by the building of a highway system through and to the same. The two situations are not analogous.

In the Grossetta case, *supra*, we said:

[fol. 68]

"... We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions. In *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, 5, the court said:

"The questions in the case concern the right of the Legislature to give to the board of land commissioners the power which it has assumed to exercise under this statute [statute similar to our section 3005, *supra*]. We think it proper first to consider the contention that the granting of the right of way is prohibited by several provisions of the acts of Congress granting the lands to the state and of the state Constitution. [Here the court sets out the provisions of the Enabling Act with reference to the grant of land to the state of Wyoming and the terms of the acceptance of such grant, which are very much like ours.] However, we cannot for a moment believe that it was intended that the restriction on the use of the lands should interfere with the establishing of public roads across them.

"The power of a state to provide highways for public use has been likened to the power of taxation and said to be well-nigh as essential to the existence of government. Courts do not hold that the power has been surrendered except in those cases where there appears the deliberate purpose of the state to abandon it. *Cincinnati v. Louisville & N.R. Co.*, 223 U.S.

390, 405, 32 S. Ct. 267, 56 L.Ed. 481, quoting the following forceful language of Mr. Chief Justice TANEY in the *Charles River Bridge* [v. *Warren Bridge*] Case, 11 Pet. 420, 547 (9 L.Ed.) 773:

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never [fol. 69] to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished." . . ." 51 Ariz. at 251, 75 P.2d at 1032

The Land Commissioner contends that the material sites damage the land upon which they are located. Our statutes at the time under which the State v. State Land, supra, decision was made was substantially the same as at the present time. In that case we held:

"We do not find anywhere in the statutes that the legislature has in terms required the state to pay a rental or royalty on the sand, rock, gravel, or natural products from these lands used in the construction of highways. Nor is there any duty imposed upon the land commissioner by the law to collect such rentals or royalties." 62 Ariz. at 255, 156 P.2d at 904

There was no evidence presented in the case in regard to these material sites. It is plain that both the granting of the rights of way and the material sites enable the building of highways, and are of material benefit to the trust lands as a whole, and enhance the value thereof.

For the reasons as set forth, we hold that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona. We, therefore, order that the writ of prohibition be made permanent.

**Ernest W. McFarland, Justice, Charles C. Bernstein,  
Justice, Howard F. Thompson, Judge.**

**Concurring:** *brevity for our attribution all but fact  
but the contrary expressed in the above*

**Lorna E. Lockwood, Chief Justice, Fred C. Struckmeyer,  
Jr., Vice Chief Justice.**

**(Justice Jesse A. Udall having disqualified himself, Judge  
Howard F. Thompson sat in his stead.)**

[fol. 71]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**[Title omitted]**

**MOTION FOR REHEARING—Filed November 29, 1965**

Obed M. Lassen, Commissioner, State Land Department respectfully moves this Court under Rule 9, of the Rules of the Supreme Court for rehearing of the Court's decision of November 12, 1965 upon the following grounds:

The decision of the Court is in direct conflict with the clear statements of the Enabling Act of Arizona (36 Stat. 557, 568-579, Ch. 310) as interpreted by the United States Supreme Court in *Ervien v. United States*, 251 U.S. 41.

The Court erred in holding: (1) that the granting of rights of way and material sites to the State Highway De-

**[File endorsement omitted]**

partment without compensating the trust funds is of material benefit to the trust lands as a whole and enhances the value thereof; (2) that it is the duty of the State Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the grant of said lands by the [fol. 72] United States pursuant to the Enabling Act; and (3) that the granting of material sites and rights of way does not amount to a disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value.

### III

The decision of the Court is in error in its reference to the case of *Grossetta v. Choate*, 51 Ariz. 248 at page 4 of the decision in that the late Justice La Prade did not write the decision, nor did the decision deal with the subject matter ascribed to it by the Court's decision in this case.

#### Argument

The sole question presented to this Court in the original petition and this motion for rehearing is whether the conditions and restrictions imposed upon the State of Arizona by the United States in the Enabling Act are binding upon the state in its management and disposal of the "trust lands". This exact question has been considered by the United States Supreme Court. The ruling of that Court in interpreting identical language from the New Mexico Enabling Act was directly opposite to the announced decision of this Court.

In *Ervien v. United States*, supra, in an appeal from *United States v. Ervien*, 246 Fed. 277, was presented the question that is now before this Court. The Legislature of New Mexico, soon after receiving their Enabling Act lands, enacted legislation which would authorize the Land [fol. 73] Commissioner to expend three percent of the annual income of his office "for making known the resources

as a whole, and enhance the value thereof."

and advantages of this State generally and particularly to homeseekers and investors". In an action brought to prevent this expenditure, arguments were presented which were identical to the arguments of the amici curiae in this case. Likewise, these arguments were very similar to the reasoning of this Court in its announced decision. At page 42 of the United States Report, the summation of the proponents argument states:

" . . . This would not constitute a breach of the trust, but only a legitimate expense in the administration of the trust estate, resulting in an increased demand for the lands, *which would increase rather than diminish the proceeds to be distributed to the beneficiaries.*  
"

"The act looks to the production of funds for the particular objects stated, but it has in mind also the aggrandizement and enrichment of the new State, whose people are the real beneficiaries; and this enrichment and aggrandizement must come through home-seekers, settlers and investors. To attract these was the particular purpose of the state statute. The general advertisement of the State was purely incidental; and both sorts of publicity tended to the same end—more competition for the lands." (Emphasis added)

In the *Ervien* case, as in the case now before this Court, in opposition to the proposed diversion of trust funds, it was argued that the Enabling Act expressly prohibited using the lands or revenue from the lands for any purpose other than that specified by Congress.

Mr. Justice McKenna, writing for the Court and affirming the Court of Appeals stated:

"The case is not in broad range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands [fol. 74] were granted and the enumeration is neces-

*sarily exclusive of any other purpose.* And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the land producing the same. *To preclude any license of construction or liberties of inference it was declared that the disposition of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should be deemed a breach of trust.'*

*"The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, . . ."*

*"The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. . . ."* (Emphasis supplied)

The language of the United States Supreme Court is clear—THE UNITED STATES AS GRANTOR OF THE ENABLING ACT “TRUST LANDS” HAD THE POWER TO IMPOSE CONDITIONS UPON THE USE OF SUCH LANDS AND WHEN IMPOSED BY EXPRESS STATUTORY LANGUAGE, HAS THE RIGHT TO EXACT STRICT PERFORMANCE OF THE CONDITIONS. The Arizona Supreme Court in considering the same conditions as were considered by the United States Supreme Court cannot ignore the holding of that court.

Perhaps this court may feel that the problem in Arizona is distinguishable from the problem in New Mexico in the *Ervien* case. The only difference in the two problems is that in New Mexico the attempt was to use revenue produced from “trust lands” for a purpose not specified in the provisions of the grant and in Arizona the attempt is to use part of the “trust lands” for purposes not specified in the provisions of the grant. The Eighth Circuit in its decision

which was affirmed by the United States Supreme Court [fol. 75] commented on this very difference stating that the difference would not alter their holding. In *United States v. Ervien*, *supra*, the Circuit Court, after acknowledging that benefits would accrue from general advertising of the State, commented on other uses that might be made of "trust lands" and "trust funds". The Court said:

"The advantage accruing is too indirectly consequential to authorize the use of trust funds. It would be but a step further to argue the advantage that would accrue to the trusts from the physical construction of some of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools and the like." (Emphasis supplied)

We submit that the language of both of the above decisions expressly prohibits the holding made by this Court in its decision of November 12, 1965. We respect this Court in its hesitancy to overturn its decisions in *Grossetta v. Choate*, *supra* and *State ex rel. Conway v. State Land Department*, 62 Ariz. 248, but in light of the above cases, which were not considered by this Court in the Grossetta and Conway cases, and in light of the facts of this case already before this Court, it seems only too clear that the holding of this Court is in direct conflict with the holding of the United States Supreme Court.

Since the filing of its brief in this case, it has come to the attention of the Respondent that of the 18 western states having "trust lands", only Arizona does not now receive compensation when its "trust lands" are used for highway construction purposes. All of the other states, either by judicial decision, as in New Mexico under the case of *State v. Walker*, 61 N.M. 248, 156 P.2d 901, or because there are no [fol. 76] state court decisions to the contrary require that the trust lands cannot be utilized by the respective highway departments unless compensation has been paid. These

states all report that this practice is accepted by their respective highway departments and by the Bureau of Public Roads, the federal agency who ultimately bears the costs to the "trust funds" by reimbursing the highway departments for 94.6 percent of their expenditures for rights of way and construction costs of the interstate highway system. This same practice of reimbursing the Arizona Highway Department for rights of way and material sites used in the construction of the interstate system is now being followed in all cases except when "trust lands" are used by the department. If on rehearing this Court should reverse its holding heretofore issued, the costs of compensating the Respondent and the respective trusts would be paid by the Bureau of Public Roads by reimbursing the Arizona Highway Department for 94.6 percent of rights of way and material site acquisition costs.

For all of the reasons set forth in this motion and for the reasons heretofore presented in Respondents Reply Brief, we urge the Court to grant a rehearing of this case and to quash the writ of prohibition.

Respectfully submitted,

Darrell F. Smith, The Attorney General.

Dale R. Shumway, Special Asst. Attorney General,  
Attorneys for the Respondents, Obed M. Lassen  
and State Land Department.

[fol. 77] Copy of the foregoing mailed this 29th day of November to:

Gary K. Nelson, Assistant Attorney General, Attorney for Petitioner.

Rex E. Lee, Jennings, Strous, Salmon, & Trask, Attorneys for Salt River Project Improvement District, 6th Floor, Title & Trust Bldg., Phoenix, Arizona.

Rawlings, Ellis, Burris & Kiewit, Attorneys for Electrical Districts Nos. 3 & 4, Pinal Cty., Suite 733, Security Bldg., Phoenix, Arizona.

Westover, Copple, Keddie & Choules, Attorneys for Welton Mohawk Irr. & Drainage Dist. of Yuma, Yuma, Arizona.

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 & 5, Pinal Cty., 85 North Country Club Drive, Phoenix, Arizona.

Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona, By: Dale R. Shumway.

[fol. 78]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

OBJECTIONS TO MOTION FOR REHEARING—

Filed December 7, 1965

Comes Now the Petitioner, by and through its attorney, pursuant to Rule 9(b), Rules of the Supreme Court, 17 A.R.S., and objects to the Respondent's Motion for Rehearing filed herein.

Of those matters raised in Respondent's Motion for Rehearing, only that ground enumerated as No. III, found on page 2 of said Motion, presents a matter which may be considered in this Motion. *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771. The reference of the court, on page 4 of its printed opinion in this cause, to the decision of *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031, as containing a lengthy discussion of the Enabling Act by the late Justice LaPrade, is obviously only an inadvertent error of reference, the decision intended to be cited being *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, wherein the able and scholarly history of the Enabling Act by the late Justice LaPrade is set forth in some 31 pages of Volume 65 of the Arizona Reports.

[File endorsement omitted]

With this portion of the opinion clarified the remaining arguments of Respondent in his Motion amount to mere reargument of his original position, *Climate Control, Inc.* [fol. 79] v. *Hill*, supra. The adoption of the *Murphy* history, as was no doubt the court's intention, clearly recognizes the authority of the very case Petitioner urges in his Motion, *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128, same case below, *United States v. Ervien*, 246 Fed. 277 (Extensively cited by Justice LaPrade in *Murphy*, supra, 65 Ariz., at pages 353-355), but holds, by implication, *Ervien*, supra, to be inapplicable to the situation presented in the case at bar.

The Motion for Rehearing should be denied.

Respectfully submitted,

Darrell F. Smith, The Attorney General, Gary K. Nelson, Assistant Attorney General.

Copy of the foregoing mailed this 7th day of December, 1965, to:

Dale R. Shumway, Esq., Special Assistant Attorney General, 4th Floor, Capitol Annex East, Phoenix, Arizona 85007, Attorney for the Respondent.

Attorneys for Amici Curiae:

Rex E. Lee, Esq., Jennings, Strous, Salmon & Trask, 6th Floor, Title & Trust Bldg., Phoenix, Arizona, Attorneys for Salt River Project Improvement District; Rawlings, Ellis, Burris & Kiewit, Suite 733, Security Bldg., Phoenix, Arizona, Attorneys for Electrical Districts No. 3 & 4, Pinal County; Westover, Copple, Keddie & Choules, Yuma, Arizona, Attorneys for Welton Mohawk Irr. & Drainage Dist. of Yuma; A. Van Wagenen, Jr., Esq., 85 North Country Club Drive, Phoenix, Arizona, Attorney for Electrical Districts Nos. 2 & 5, Pinal County; The Honorable Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona; The Honorable E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Gary K. Nelson.

[fol. 80]

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

[Title omitted]

**MEMORANDUM IN OPPOSITION TO MOTION  
FOR REHEARING**

The Motion for Rehearing in this case is nothing more than a restatement of the position taken by the respondent in his initial Brief. This Court has held that "by long established rule of Court" a reargument of a party's initial position is not ground for reconsideration of a decision by this Court. See *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771 (1960); *Copper Queen Mining Co. v. Arizona Prince Copper Co.*, 2 Ariz. 169, 11 Pac. 396 (1886).

At the close of its Motion for Rehearing, the respondent makes two factual assertions which are totally devoid of any authority or support in the record. This Court has held that it will not consider assertions of fact made for the first time upon Motion for Rehearing. *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 349 P.2d 771 (1960). Moreover, even if such assertions were cognizable, they are totally irrelevant.

The respondent's argument in reliance on the *Ervien* case was advanced in his initial Brief and simply reiterated here. For reasons set forth on pages 15-18 of our initial Brief, the *Ervien* case not only does not support the [fol. 81] respondent's position, but is authority against it. *Ervien* was a suit brought by the United States Attorney General, and the benefit in the *Ervien* case was to inure to the entire State of New Mexico, and not just to the trust lands. *Ervien* antedated both *Grossetta* and *Conway*. It is no more inconsistent with this Court's holding now than when *Grossetta* and *Conway* were decided.

[fol. 81] Act and all to the signature of everyone  
except the add [File endorsement omitted]

Stripped of irrelevancies, the position taken by the respondent in his initial brief was a simple one: two well-settled precedents of this Court should be rejected in favor of a single decision by the New Mexico Supreme Court. That is precisely the position taken by the respondent on this Motion for Rehearing. This Court has unanimously rejected this argument in the instant case and similar arguments on two prior occasions. Manifestly, there is nothing in the Motion for Rehearing which warrants reconsideration of the issue.

Respectfully submitted this 7th day of December, 1965.

Rawlins, Ellis, Burrus & Kiewit, Attorneys for Electrical Districts Nos. 3 and 4, Pinal County, Suite 733, Security Building, Phoenix, Arizona.

A. Van Wagenen, Jr., Attorney for Electrical Districts Nos. 2 and 5, Pinal County, 85 North Country Club Drive, Phoenix, Arizona.

E. Leigh Larson, County Attorney, Santa Cruz County, Nogales, Arizona.

Westover, Copple, Keddie & Choules, Attorneys for Welton Mohawk Irrigation & Drainage, District of Yuma, Yuma, Arizona.

[fol. 82] Richard J. Riley, County Attorney, Cochise County, Bisbee, Arizona.

Jennings, Strouss, Salmon & Trask, J. A. Riggins, Jr., Rex E. Lee, By Rex E. Lee, Attorneys for Salt River Project Improvement and Agricultural District, 6th Floor, Title & Trust Building, Phoenix, Arizona 85003.

Riley, County Attorney, Cochise County Justice, Arizona  
The Honorable Robert James Hobson, County Attorney, Santa Cruz County, Nogales, Arizona.

Gary E. Nelson

[fol. 83] [Redacted] decision to turn over and sell off all public lands.

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

No. 8620

**STATE OF ARIZONA, ex rel.**

**ARIZONA HIGHWAY DEPARTMENT, Petitioner,**

vs.

**OBED M. LASSEN, Commissioner,**

**STATE LAND DEPARTMENT, Respondent.**

**MOTION FOR LEAVE TO BE HEARD AMICUS AND FOR  
RECONSIDERATION—Filed December 13, 1965**

In behalf of the Arizona Education Association, we move for leave to make an amicus appearance in this matter; and we ask both that the petition for rehearing be granted and that the matter be set down for additional argument.

Respectfully submitted,

Lewis Roca Scoville Beauchamp & Minton, By John P. Frank, Don A. Davis, Attorneys for Arizona Education Association.

**Memorandum**

This case involves substantial public school land interests. The Arizona Education Association has a primary duty to represent educational interests in Arizona. Our public lands are a heritage for school children yet unborn. By this decision, so profoundly unhappy from the educational point of view, these public lands may be crisscrossed with roads or utility lines, all without the protection we believe afforded such lands by the Arizona State Enabling [fol. 84] Act and all to the abundant benefit of everyone except the education of the future.

If this is the law, then we must of course yield. But the decision conflicts with the New Mexico decision of *State ex rel. State Highway Commission v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956). This our Court has fully recognized, and it has seen fit to reject the New Mexico point of view just as New Mexico has rejected, on this same subject matter, our point of view. But we are interpreting an Act of Congress which has been interpreted in *Ervien v. United States*, 251 U.S. 41, 40 Sup.Ct. 75 (1919). Respondents in the instant case have relied heavily on *Ervien*, both originally and in the petition for rehearing. The New Mexico Court, whose views our Court has seen fit to reject, also relies heavily on *Ervien*. Yet our Court in its opinion in the instant case has not seen fit to deal with *Ervien* at all. We respectfully submit that it warrants consideration.

We freely acknowledge that this matter has been very ably presented by Assistant Attorney General Shumway representing the Land Department's point of view. Nevertheless, there has been no one in the cause expressly representing the educational interest as such, while the counter utility interest has been very abundantly represented by the various amici. If this were purely private litigation, we would suppose that it was simply too late further to consider the matter here. But it is not private. In the circumstances, we submit that the education interest ought to be separately and independently heard, and we therefore ask that the matter be held open; that the Arizona Education Association be permitted to file a brief on the merits; and that the Court then consider whether additional argument might be proper.

Respectfully submitted,

Lewis Roca Scoville Beauchamp & Linton, By John  
P. Frank, Don A. Davis.

[fol. 86] [redacted] [redacted] [redacted] [redacted] [redacted]  
IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 8620

STATE OF ARIZONA, ex rel.  
ARIZONA HIGHWAY DEPARTMENT, Petitioner,

vs.

OBED M. LASSEN, Commissioner,  
STATE LAND DEPARTMENT, Respondent.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO BE  
HEARD AMICUS AND FOR RECONSIDERATION—Filed December  
14, 1965

Had Arizona Education Association sought to file an amicus brief at an earlier stage in this matter, we would have had no objection. Coming as it does at this time, and being utterly devoid of any suggestion as to further points which have not already been presented to the Court, we submit that the Motion adds nothing and should not be allowed to further delay the final determination of the rights of interested parties.

*Ervien v. United States* was extensively argued in the initial briefs, and was asserted by both sides to support their respective positions. The Memorandum submitted by counsel for the Arizona Education Association can be searched in vain without the vaguest suggestion of any new argument relevant to *Ervien* or anything else which would be submitted to the Court if final decision were delayed.

It is respectfully submitted that under the relevant authorities set forth in *Climate Control, Inc. v. Hill*, 87 Ariz.

201, 349 P.2d 771 (1960), this Motion to be heard amicus,  
and the Petition for Rehearing should be denied.

Respectfully submitted,

Jennings, Strouss, Salmon & Trask, By Rex E. Lee,  
Attorneys for Salt River Project Improvement &  
Power District.

[fol. 88]

SUPREME COURT

STATE OF ARIZONA

PHOENIX

[Title omitted]

**ORDER DENYING MOTION FOR REHEARING AND MOTION FOR  
LEAVE TO FILE AMICUS CURIAE BRIEF—March 10, 1966**

The following action was taken by the Supreme Court  
of the State of Arizona on December 14, 1965, in regard to  
the above-entitled cause:

**"ORDER: Respondent's motion for rehearing = DENIED."**

**FURTHER ORDERED: Motion to file brief Amicus Curiae  
= DENIED."**

**Sylvia Hawkinson, Clerk, By .....,  
Assistant Clerk.**

**To:**

**Darrell F. Smith, Attorney General.**

**Attention:**

**Dale R. Shumway [For Obed M. Lassen & State Land  
Dept.]**

**Gary K. Nelson, Assistant Attorney General [For Peti-  
tioner]**

[File endorsement omitted]

Lewis Roca Scoville Beauchamp & Linton [For Arizona Education Assn.]

Jennings Strouss Salmon & Trask [for Salt River Project Imp. Dist.]

Westover, Copple, Keddie & Choules [For Welton Mohawk I & D Dist.]

Rawlins, Ellis, Burrus & Kiewit [For Elec. Dists. Nos. 3 & 4, Pinal]

A. Van Wagenen [For Elec. Dists. Nos. 2 & 5, Pinal County]

Richard J. Riley, County Attorney Cochise County, Bisbee, Arizona

E. Leigh Larson, County Attorney Santa Cruz County, Nogales, Arizona

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 1109, October Term, 1965

OBED M. LASSEN, Commissioner, STATE LAND DEPARTMENT,  
Petitioner,

v.

ARIZONA ex rel. ARIZONA HIGHWAY DEPARTMENT.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~109~~ 84

OBED M. LASSEN, Commissioner,  
State Land Department,

Petitioner,

vs.

THE STATE OF ARIZONA, *ex rel.*  
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
STATE OF ARIZONA

DARRELL F. SMITH  
THE ATTORNEY GENERAL OF ARIZONA

By Dale R. Shumway  
Capitol Building  
Phoenix, Arizona

and  
Special Assistants

John P. Frank  
900 Title & Trust Building  
Phoenix, Arizona

Dix W. Price  
610 Luhrs Tower  
Phoenix, Arizona

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. \_\_\_\_\_

OBED M. LASSEN, Commissioner,  
State Land Department,

Petitioner,

vs.

THE STATE OF ARIZONA, *ex rel.*  
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ARIZONA**

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, entered in the above-entitled case on November 12, 1965.

**Citations To Opinions Below**

The opinion of the Supreme Court of Arizona is reported at 99 Ariz. 161, 407 P.2d 747 (1965). It is attached as Appendix B hereto.

**Jurisdiction**

The decision of the Supreme Court of Arizona was filed on November 12, 1965. A petition for rehearing was denied on December 14, 1965 (Appendix C). The relevant portions of the initial and responsive pleadings are attached as Appendix D and Appendix E. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3). The matter was instituted as an original proceeding in the court below as an application for a writ of prohibition. The sole issue in the case is the interpretation of an Act of Con-

gress, the New Mexico-Arizona Enabling Act, June 20, 1910, Ch. 310, 36 Stat. 557, as amended, attached as Appendix A. This issue was raised in the initial pleading (the application for a writ of prohibition), and the issue has been preserved in all subsequent pleadings. The court below interpreted the Act of Congress adversely to the claim of petitioner here, and the entire opinion of that court (Appendix B, *infra*) deals with no other subject than the interpretation of the Act of Congress. The order of the court below was entered on November 12, 1965 as a part of its opinion in the case.<sup>1</sup>

#### **Question Presented**

Whether an Act of Congress providing that certain public lands granted to a state shall be held in trust for the benefit of public schools and other designated public purposes is violated by allowing a state highway department to take the lands for rights-of-way and material sites without compensation.

#### **Statute Involved**

The statutory provisions involved are Secs. 24 to 28 of the New-Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, 572-75, as amended. The statute is set forth in Appendix A and the essential language of Sec. 28 is as follows:

"[All] lands hereby granted . . . shall be by the said

<sup>1</sup> The court below is given the power to issue writs of prohibition by Arizona Constitution, Art. 6, Sec. 4, and A.R.S. Sec. 12-102. Although Arizona Supreme Court Rule 14(a) provides for the issuance of mandate to a trial court, the court's practice in granting a permanent writ of prohibition is simply to include the order in its opinion, as was done in the present case. There is thus no other order or judgment to be entered, and the opinion of the court below is also the order from which this petition has been taken.

State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . . .

"Disposition of any of said lands . . . for any object other than for which such particular lands . . . were granted or confirmed . . . shall be deemed a breach of trust . . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void . . . .

"Nothing herein contained shall be taken as in limitation of the power of the State or any citizen thereof to enforce the provisions of this Act."

#### Statement

The New Mexico-Arizona Enabling Act granted certain public lands to the then anticipated states of New Mexico and Arizona. It expressly provided that these lands should be "held in trust, to be disposed of in whole or in part" only as provided in the statute. A certain specific portion of the lands granted—certain precise sections—were granted "for the support of common schools" and it was expressly provided that "disposition of any such lands" except in accordance with the Act "shall be deemed a breach of trust."<sup>2</sup>

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<sup>2</sup> Other specific purposes provided in the statute are for: university purposes, legislative, executive, and judicial public buildings, penitentiaries, insane asylums, schools and asylums for the deaf, dumb, and blind, miners' hospitals, state charitable, penal and reformatory institutions, agricultural and me-

(Footnote continued)

As will be developed in the petition following, in other states with substantially similar provisions concerning public lands, the lands thus put in trust are held to be in trust for the specific purposes therein named; there is no exception which permits invasion of the trust because some other use not specified in the grant is also said to be "public." This, however, has not been the course of decisions in Arizona. In *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Arizona Supreme Court held that the Enabling Act did not prohibit the construction of a county highway across school lands since the Enabling Act did not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways. In *State v. State Land Dept.*, 62 Ariz. 248, 156 P.2d 901 (1945), the State Land Commissioner was held not entitled to receive or collect payment for, and the Highway Department was not required to purchase or lease, school and institutional lands or their natural products used for establishment, construction, maintenance or repair of state highways. The Commissioner was required to issue, upon proper application, necessary permits to enable the Highway Department to perform its duties respecting the administration of state highways.

In 1964, the State Land Commissioner, Arizona's officer charged with the administration and protection of public

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chanical colleges, school of mines, and payment of certain county bonds, with the remainder of lands and proceeds not used for these purposes to become a part of the permanent school fund. See Sec. 25 of the Enabling Act. Of the 10,790,000 acres granted to the State for all designated uses, over 9,180,000 acres are for various educational purposes. See Arizona State Land Commissioner, Annual Report 28 (1965).

lands, issued a regulation,<sup>3</sup> under which highway rights-of-way and material sites might be granted by the Land Department on the basis of appraisal and payment. The Arizona Highway Department, after administrative proceedings, filed an original proceeding in the Arizona Supreme Court to prohibit the Land Commissioner from enforcing the regulation. The Supreme Court of Arizona granted the writ of prohibition on the ground that the Enabling Act did not require payment for the taking of trust lands by the Highway Department. This petition for certiorari is taken from that decision.

In the Supreme Court of Arizona, the challenging party was the State Highway Department, supported by various public utilities which contended that they also were State governmental subdivisions; the defending party was the State Land Department.<sup>4</sup>

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<sup>3</sup>The text of the regulation is:

"State and County highway Right-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in A.R.S. Sec. 12-1122."

<sup>4</sup>It will be observed that the contest is thus both in form and in very real substance between two different agencies of the State of Arizona, the Attorney General of the State being the common lawyer for both. Under Arizona law, the Attorney General, a county attorney, or a special counsel under the direction of the Attorney General represents the Land Department in actions relating to State lands, A.R.S. Sec. 37-102(C). The Attorney General also represents the Highway Department, A.R.S. Sec. 18-114. Where the interest of State agencies have collided, it has been held proper for the Attorney General, through his deputies, to represent both sides in the controversy; see *State v. Hunt*, 59 Ariz. 256, 129 P.2d 303, reversed on

(Footnote continued)

To avoid duplication, figures as to the volume of school and other lands at stake are reserved for a later section of this petition.

### Reason for Granting the Writ

#### A. Conflict of Authorities.

1. The decision of the court below is in conflict with other decisions interpreting the same or similar statutes.

The essence of the decision in the instant case is that there is no "disposition" of trust lands by giving easements for highway rights-of-way and material sites. The Arizona court said: "The respective rights-of-way for these highways take less than a fee estate and there is no disposition of trust areas and the trust and its beneficiaries are not deprived of anything of value." 407 P.2d at 750. It held that the value of the land is enhanced, that there is an advantage to the trust lands by giving the rights-of-way and material sites and that therefore the Land Department has no claim on behalf of the trust.

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*rehearing on other grounds*, 59 Ariz. 312, 127 P.2d 130 (1942), provided that he is acting within the statutory scope of his authority. See *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960). To insure that this is an absolutely adversary proceeding, the Attorney General has appointed Mr. John P. Frank and Mr. Dix W. Price as special counsel in this cause. In addition to being an attorney, Mr. Price is the Executive Secretary of the Arizona Education Association and Mr. Frank is compensated entirely in this matter by the Arizona Education Association. The defense of the trust lands, of which school lands comprise by far the largest portion, has thus been assigned to a completely independent teachers' organization of the State with a vital interest in the future of the schools. The Arizona Education Association is the professional association of twenty-five thousand teachers and school administrators in the State, comprising eighty-five per cent of all Arizona educators. Throughout its history, the Association has acted vigilantly to protect the public trust lands. As is developed in the text, strong exponents in the court below favoring this rape of the trust lands are public utilities which anticipate extension of this privilege to themselves.

The Arizona authorities are in accord with *Ross v. Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3, rehearing denied, 31 Wyo. 464, 228 Pac. 642 (1924), although it should be noted that on the basis of advice received from the Attorney General of Wyoming, to be reflected in an *amicus* brief in this Court, the *Ross* case is in fact no longer being applied in Wyoming.

2. The holding of the court below is the precise opposite of *State v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), in which the identical questions under the identical Enabling Act were presented for decision and the opposite result reached. The court there held that the New Mexico State Highway Commission must compensate the school trust for rights-of-way and construction material that it had taken. The Supreme Court of Arizona specifically and by name rejected *State v. Walker*.

3. The decision further conflicts with the exceedingly analogous decision under a highly similar statute in *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941). The issue there was whether the state highway commission could take school lands without compensation for rights-of-way in view of the provision of the Enabling Act of North Dakota that the lands were held in trust. The North Dakota court held that this amounted to a taking of property and was not permitted under the Enabling Act.<sup>8</sup>

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<sup>8</sup> The North Dakota court distinguished the prevailing Arizona decision on the ground that the taking of land for a highway in Arizona is regarded as an easement rather than as a taking of the fee itself. In view of the provisions of the Arizona Enabling Act that the land may not be disposed of "in whole or in part" except in accordance with the provisions of the Act, we regard this as an insignificant difference. This is particularly true because the New Mexico-Arizona statute provides

(Footnote continued)

4. The case further conflicts with the Nebraska rule as set forth in *State v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) and *State v. Central Nebraska Pub. Power & Irrigation Dist.*, 143 Neb. 153, 8 N.W.2d 841 (1943). While these cases are distinguishable on details of fact, the general principle established by the Nebraska court is that the public school lands cannot be depleted and that the legislature is not authorized to make a grant of public school lands without compensation for the taking, regardless of whether the grant is in fee, as an easement, or by lease.<sup>6</sup>

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that "every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof" not made in substantial conformity with the Act shall be null and void. A more total "use" than the construction of highways upon or taking material from the trust lands can scarcely be imagined. By whatever name it is called, there is a permanence in the taking that forever makes the land unfit for any other purpose.

The *Central Nebraska* case held that under the terms of the Nebraska Enabling Act, 13 Stat. 47 (1864), and of the Nebraska Constitution of 1866, Art. VII, Sec. 1, the state was under a contractual as well as a constitutional obligation to refrain from disposition or alienation of school lands except as there provided. Sec. 7 of the Nebraska Act provided that specified sections would be set aside "for the support of common schools," and the Constitution had confirmed this trust. Therefore the school fund was entitled to damages for the unauthorized taking of lands for an irrigation canal. In the *Board of Lands* case, a statute authorizing lease renewals in certain circumstances was held to violate the provisions of the Nebraska Constitution relating to the school trust, since it did not result in the most advantageous return to the trust. Thus Nebraska has clearly recognized that the use of an interest representing less than the fee, as well as the fee itself, without full compensation to the school trust, is prohibited.

Cf. *State v. Board of Educ. Lands & Funds*, 159 Neb. 79, 65 N.W.2d 392 (1954), where it was held that attorneys' fees incurred in the successful prosecution of the *Board of Lands* case could not be recovered from the fund even though the fund was the incidental beneficiary, where there was no specific authorization for such allowance.

5. There is also a conflict between this case and *State v. District Ct.*, 42 Mont. 105, 112 Pac. 706 (1910), holding that school lands could not be condemned for dam and reservoir purposes.<sup>7</sup> This case was distinguished by the Arizona court in *Grossetta v. Choate*, 51 Ariz. at 253, 75 P.2d at 1033 (1938), solely on the ground that it involved the taking of a fee rather than of an easement.

6. Finally, the decision of the court below conflicts in principle with the decision of this Court in *Ervien v. United States*, 251 U.S. 41, 40 Sup.Ct. 75, 64 L.Ed. 128

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<sup>7</sup> Sec. 10 of the Montana Enabling Act also granted lands "for the support of common schools," and Art. 17, Sec. 1 of the Montana Constitution placed the lands in trust, to be disposed of only for the purposes for which they had been granted. Accordingly the attempted condemnation of school lands in the case of *State v. District Ct.* also was held to violate the contract between the state and the federal government; a writ of prohibition was issued to prevent further condemnation proceedings as to them. Given these constructions of the more general provisions of their Enabling Acts by the Montana and Nebraska courts, the conclusion is inescapable that the far more restrictive and detailed corresponding provisions of the Arizona Act should be given at the very least a similarly restrictive interpretation.

See also *State v. Fitzpatrick*, 5 Idaho 499, 51 Pac. 112 (1897) and *United States v. Fenton*, 27 F. Supp. 816 (D. Idaho 1939), where a similar enabling act and constitutional provisions were interpreted to prevent any dissipation of school funds or violation of the conditions of the trust. The Idaho Enabling Act, Ch. 656, 21 Stat. 215 (1890) and Idaho Constitution, Art. 9, Sec. 3, were held in *Fitzpatrick* to prevent the legislature from enacting a statute permitting forfeitures or penalties to be paid from trust funds, since under those provisions the fund must be kept "inviolate and intact." In *Fenton*, following *Fitzpatrick*, the court held that a state statute of limitations was ineffective to limit the right of the state to assert its mortgage rights in a condemnation action brought by the United States. It carefully distinguished the ability of the state to handle revenues belonging to it from the restrictions surrounding control of the common school fund, citing *Board of Comm'rs v. State*, 125 Okla. 287, 257 Pac. 778 (1926).

(1919). In *Ervien*, New Mexico had passed an act authorizing funds derived from the sale of public lands to be expended for advertising the resources and advantages of the State of New Mexico. An action was brought under the identical Enabling Act here involved to enjoin such expenditures on the grounds that the revenues from public lands could be used only for specific purposes and that it would be a breach of trust to use them for any other. This Court, in holding that the trust obligation was to be strictly construed, disposed of the matter briefly by approving of "the careful opinion of the Circuit Court of Appeals." This opinion, 246 Fed. 277 (8th Cir. 1917), reviewed the "advantage theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it, saying:

"It would be but a step further to allow the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools, and the like." *Id.* at 279-80. (Emphasis added.)

Arizona has now taken that further step. New Mexico, in *State v. Walker*, relied extensively on *Ervien v. United States* in rejecting the theory that some benefit, real or fancied, permitted invasion of the trust. (See 301 P.2d at 319-20). Arizona, while rejecting *State v. Walker*, has not so much as mentioned the *Ervien* case although it was repeatedly pressed in the court below.

7. The sole theory of distinction between the Arizona decision and the cases which have gone the opposite way has been a notion that somehow there is a profound legal difference between the taking of an easement, which a highway right-of-way is called in Arizona, and the taking

of fee title, as is the practice, for example, in North Dakota. This, we respectfully submit, makes a great matter depend upon the form of an incantation. The use of land for designated purposes is not rendered the more beneficial because a superhighway with tons of concrete lies upon the ground or because excavations for materials are made by virtue of an easement rather than fee title. The practical consequences are absolutely identical. The New Mexico-Arizona statute permits of no such thin evasion of the obvious purpose of the trust—it is expressly provided that the "use" of the land as much as the transfer of its fee is subject to the trust. But this specialized New Mexico-Arizona provision is not required to dispose of the general problem, for an easement is in any case, under Arizona law as elsewhere, an interest in land,<sup>8</sup> and the Congress has carefully avoided enacting a statute which would permit the trust to be invaded by one kind of conveyance of an interest and not another.

#### *B. Importance of the Issue.*

The question presented is of importance in interpreting not only the Enabling Acts of Arizona and New Mexico but of all other states which provide for public lands to be held in trust for school or other purposes.

Put at its narrowest, this matter is one of importance in the State of Arizona. The aggregate school lands in Arizona are in excess of 9,180,000 acres.<sup>9</sup> The acreage taken for material sites and state and federal highway purposes between 1956 and 1965 was 40,173.88 acres at

<sup>8</sup> See, e. g., *Etz v. Mamerow*, 72 Ariz. 228, 233 P.2d 442 (1951); *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 237 Pac. 636 (1925).

<sup>9</sup> See Arizona State Land Commissioner, Annual Report 28 (1965).

a total estimated value of \$9,892,700.17,<sup>10</sup> all of which is thus taken from the trust established by the Congress for future generations of specific classes of beneficiaries. The volume of lands involved in other states is substantial, although we have no precise figures as to its exact amount.

The matter is gaining in importance with the changing nature of highway construction. We appreciate that there is no difference in principle between an easement for a winding, unfenced dirt road across wholly undeveloped desert and an easement for a modern superhighway. Nonetheless, there is an immense practical difference, and intrusions which could perhaps be borne with tolerance in Arizona in the 1940's become intolerable in the 1960's. We deal here with great multi-laned boulevarded highways, with culverts on the sides and fences along the edge, highways which not merely rip acres out of sections, but which, because of modern limited access practices, cannot readily be crossed. We deal here also with tremendous excavations left in the land where material has been removed and transported to other locations for highway construction purposes. Whatever values these splendid new roads may have for the motoring or trucking public, they are in a major degree totally destructive of the use of the land for the primary purpose of the trust. These highways may give vast benefits, and doubtless do, to the interstate traveler but not to the land itself, which is completely destroyed in its usefulness as revenue producing acreage.

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<sup>10</sup> This information has been obtained from the Arizona State Land Department. At the inception of the present case, the Land Commissioner compiled a survey of the value of all State trust lands, based upon the values of adjoining lands.

But the highway takings are only a small part of what may reasonably be anticipated to follow from this decision. The *amici* below were various counties and irrigation and power districts of the state, each of which can also claim to be governmental subdivisions or institutions like the Highway Department and each of which has roads, power lines, ditches or other facilities which it wishes to run across trust lands without paying for the privilege.<sup>11</sup> Other state agencies as well, such as the Fish and Game Department, and the Parks Board, have expressed a desire to use the trust lands for their own purposes without compensation. Clearly, from a quantitative standpoint alone, the issue is very substantial.

### *C. The Decision Below Gains Importance by the Magnitude of its Error.*

The decision below gains a portion of its importance and a portion of its "conflict" from the degree of its error. The decision violates the Enabling Act itself. The New Mexico-Arizona Enabling Act is much more elaborate and restrictive than some of its predecessors because, by the time of the admission of the 47th and 48th states, Congress had learned that public lands intended to be held for future generations faced real possibilities of

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<sup>11</sup> The immediacy of the interest of the *amici* below is illustrated by the 1963 agreement between the Salt River Project and the State Land Department under which the Project is presently paying under protest a rental charge on new rights-of-way across school lands pending the outcome of the test of the lawfulness of the Commissioner's regulation requiring compensation. Were a final decision entered in favor of the Highway Department, the Salt River Project and other similar utilities would assert the same power to take right-of-way easements, under the authority of A.R.S. Sec. 45-838.

dissipation. A then recent fraud in New Mexico had brought the matter into sharp focus.<sup>12</sup>

Thus the New Mexico-Arizona law, rather more particularly than other statutes, details just how the lands might be sold. A letter of former Secretary of Interior Garfield was quoted in Congress on the necessity for curing the situation by which other states did not "derive the full benefit to which the schools are entitled."<sup>13</sup> The Senate Report recorded that the statute would stiffen the provisions for school lands protection and would provide "careful and rigid, though entirely reasonable and practical, restrictions." In the language of the Report, the bill:

"expressly declares that the land granted and confirmed to the new states shall be held in trust, to be disposed of *only as therein provided and for the several objects specified.* . . . Mortgages are entirely forbidden, and the sales or leases are required to be made to the highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in the case of any lease for a period of five years or less." (Emphasis added.)

This, said the Committee, was "nothing new in principle." S. Rep. No. 454, 61st Cong., 2d Sess., pp. 19-20 (1910).

<sup>12</sup> See S. Rep. No. 454, 61st Cong., 2d Sess., p. 20 (1910); statement of Senator Beveridge, 45 Cong. Rec. 8225 (1910). See generally the legislative history in *Murphy v. State*, 65 Ariz. 338, 181 P.2d 338, 344-46 (1947).

<sup>13</sup> The reference at this point is to setting a minimum price, H. Rep. No. 152, 61st Cong., 2d Sess., p. 4 (1910). An Arizona representative at the Senate Committee hearings was expressly interrogated as to whether he accepted in behalf of his state "the careful restrictions put about the dispositions of lands" and indeed the Arizonan outdid his questioner—"I believe the restrictions on such public lands cannot be made too broad." Hearings on S. 5916 before the Senate Committee on Territories, 61st Cong., 2d Sess., p. 88 (1910).

As illustrative of the attitude taken by Congress toward the restrictions imposed by the Act, the Enabling Act was specially amended in 1935 to give to the Town of Benson, Arizona, one section of land for use as a public park (49 Stat. 798). In other words, when the Town of Benson was given 640 acres to use as a park, the Enabling Act had to be amended; yet under the present Arizona practice, forty thousand acres have been given for highways and material sites in the last ten years without any amendment to the statute and without any payment to the trust.<sup>14</sup>

### Conclusion

The Congress of the United States has made an exceptionally earnest effort to establish public lands in trust for specifically designated public purposes, and particularly for schools. Under the decision of the court below, the future school children and beneficiaries of this trust may have the doubtful benefit of seeing the acreage intended to be preserved for them criss-crossed with highways and public utility lines. These will make

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<sup>14</sup> Other amendments of the Act have been made to enlarge the State's power to lease trust lands, both as to duration and to purpose. See Act of June 5, 1936, Ch. 517, 49 Stat. 1477; Act of June 2, 1951, Ch. 120, 65 Stat. 51.

The Committee Reports accompanying these amendments emphasize that the changes in the provisions regarding leases were made to overcome the restrictions in the Act, necessarily recognizing that the Act operates to prevent, without specific authorization, conveyances of less-than-fee interests in trust lands as well as conveyances of the fee. See H. Rep. 1103, 74th Cong., 1st Sess. (1935); S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H. Rep. No. 429, 82d Cong., 1st Sess. (1951). Since an easement is also a less-than-fee interest in land, see note 8 *supra*, it follows that if conveyances of such an interest are to be allowed without compensation, a similar amendment of the Act would be required.

the land itself utterly useless for any purpose except transportation, and they are without one cent of contribution to the trust the Congress so carefully created. Such result conflicts first with the Act itself, second with the most elementary conception of a fiduciary duty, and third with the decisions as to the New Mexico-Arizona and other Enabling Acts.

It is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,  
**DARRELL F. SMITH**  
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**March, 1966.**

**APPENDIX A****New Mexico-Arizona Enabling Act**

Sec. 24. That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however,* that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships con-

taining six hundred and forty acres or more: And provided further, that the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

Sec. 25. That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eighteen hundred and three, which grants are hereby declared not to extend to the said State, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two) one million acres: *Provided*, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State.

Sec. 26. That the schools, colleges, and universities provided for in this Act shall forever remain under the executive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Sec. 27. That five per centum of the proceeds of sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands,

or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under

lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: Provided, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as

at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State and equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be

in any manner derived from any of said land the same be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

**APPENDIX B**

**IN THE SUPREME COURT OF THE  
STATE OF ARIZONA**

**En Banc**

**THE STATE OF ARIZONA, ex rel  
ARIZONA HIGHWAY DEPARTMENT,**

**v. Petitioner,**

**OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,**

**Respondent.**

**No. 8620**

**Alternative Writ of Prohibition Heretofore**

**Issued Made Permanent**

Darrell F. Smith, The Attorney General

Robert W. Pickrell, former Attorney General

Gary K. Nelson, Assistant Attorney General

Attorneys for Petitioner.

Dale R. Shumway, Special Assistant Attorney General

Attorney for Respondent.

Rex E. Lee

Jennings, Strouss, Salmon & Trask, Attorneys for

Salt River Project Agri. Improvement District

Rawlins, Ellis, Burrus & Kiewit, Attorneys for

Electrical Districts Nos. 3 & 4, Pinal County

A. Van Wagenen, Jr., Attorney for

Electrical Districts Nos. 2 & 5, Pinal County

E. Leigh Larson, County Attorney, Santa Cruz County

Westover, Copple, Keddie & Choules, Attorneys for

Welton Mohawk Irrigation & Drainage District

Richard J. Riley, County Attorney for Cochise County,

Attorneys for Amici Curiae

McFARLAND, Justice:

For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579.

On December 14, 1964, the State Land Commissioner, hereinafter designated as Land Commissioner or respondent, after giving notice of a proposal to change the rules and regulations governing the rights of way and material sites over these lands, and holding a hearing at which petitioner appeared and filed an objection thereto, adopted the following rule designated as Rule No. 12 of the State Land Department, to-wit:

"State and County highway Rights-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in ARS 12-1122."

Objectons were overruled. On the same day, the State Highway Department, hereinafter designated as the Department or petitioner, filed this writ of prohibition to prevent respondent from enforcing this rule. An alternative writ of prohibition was granted by this court.

The question presented in this case is whether the Land Commissioner has the authority to adopt the rule as set forth which, in effect, provides for the payment for rights of way and material sites over these trust lands by the petitioner.

The lands were granted to the State of Arizona by the federal government pursuant to the Enabling Act of Arizona, June 20, 1910. Under Sec. 24 of this act, the State was granted "in trust," certain sections of every township for the support of common schools, with the opportunity to make indemnity selections where any of the sections were lost for one or more reasons. Congress further provided, in Sec. 25 of the Enabling Act, twelve specific grants for the following purposes: university, legislative, executive and judicial, public buildings; penitentiaries; insane asylum; school and asylum for deaf, dumb and blind; miners' hospital; normal schools; state charitable, penal and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutions; and county bonds. By Sec. 1, Art. 10, of the Constitution of Arizona, the people of Arizona accepted the terms of the Enabling Act.

"§ 1. Acceptance and holding of lands by state in trust

"Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

Respondent claims it has this authority under Section

28 of the Enabling Act, which sets forth the rules for the administration and disposition of the "trust lands" confirmed to the State of Arizona under Sec. 24 and Sec. 25. Section 28 provides, in part:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

\* \* \*

"... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction ...

\* \* \*

"... nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves ...

"A separate fund shall be established for each of the

several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed . . .

\* \* \*

" . . . It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

It is the contention of the respondent that, under the terms of these rules, it is a breach of trust to allow the petitioner to use the "trust lands" without compensating the trust fund for the use thereof.

This question has been before this court on two prior occasions—the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031, and the case of *State v. State Land Department*, 62 Ariz. 248, 156 P.2d 901. In *Grossetta*, *supra*, the late Justice LaPrade set forth an able and scholarly history of the Enabling Act. We see no reason for trying to add to the history of this act, or the reasons as set forth in *Grossetta*, and *State Land*, *supra*. In the case of *State v. State Land Department*, *supra*, we said:

"The holding of this court in the case of *Grossetta v. Choate*, 51 Ariz. 248, 75 Pac. (2d) 1031, substantially determines all the issues herein involved. In that case, we reviewed an order of the trial court holding

that the establishment of a county highway over school land was void because the land was held in trust under the Enabling Act, and that the granting of a right-of-way thereover to a county was a violation of the Act. The judgment of the lower court was reversed, the holding being that the land department could grant a right-of-way for public highways over school land to the several counties since the Enabling Act does not limit the power of the legislature to authorize grants of right-of-way easements over public lands for public highways.

"This decision was predicated on an interpretation of Section 11-601, Arizona Code Annotated 1939. This section of the code, together with the provisions contained in Sections 11-1001, 11-1002 and 11-1003, were all enacted at the same time. See Laws of 1915 (2nd S.S.). Sections 11-1001, 11-1002 and 11-1003 were in effect at the time of the opinion and judgment in the case of *Grossetta v. Choate*, *Supra*. The holding in the *Grossetta v. Choate*, *supra*, case was predicated not only on the statutory provisions of Section 11-601, but also considered the restrictions of the grant in the Enabling Act.

"It is the contention of the land commissioner that this court in the *Grossetta* case did not pass on the question of whether such rights-of-way may be granted without compensation to the permanent fund to which he contends the lands are attached or belong.

"In the *Grossetta* case we cited the case of *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, and from a very lengthy opinion rendered on petition for rehearing in that case (31 Wyo. 464,

228 Pac. 642, 647), we quote with approval a portion of the opinion as applicable to the question under consideration:

"The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and maintaining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held; or of the constitutional restrictions upon its disposal. For the natural tendency of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.'

"It is true that in the Grossetta case, the court did not in terms pass on the question of whether under Section 11-1001, *supra*, easements for highways could be granted over these lands without compensation. It is evident, however, that this court in the Grossetta case had in mind the undoubted right

of the state to provide for public highways, and if such highway was for a wholly public purpose, the right of the state to use such school or institutional lands for highway rights-of-way without compensation is inferred." 62 Ariz. at 253, 156 P.2d at 903

The Land Commissioner, in his brief, contends that this court should follow the decision of the Supreme Court of New Mexico in the case of State v. Walker, 61 N.M. 374, 301 P.2d 317, rather than our own decisions, for the reason that the Enabling Acts for each state were identical. We are of the opinion that the holdings in the case of State of Arizona v. State Land Department, *supra*, and *Grossetta v. Choate*, *supra*, are sound, and see no reason for departing from these decisions.

The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value. It is well known that good highways throughout a state increase the value of the lands. These lands are located throughout the state. The Land Commissioner, in his memorandum, sets forth what he states to be a fair value for these rights of way. He does not give the basis of the value, nor was it based upon evidence submitted in the case. Certainly, if the highways had not been established the values of these lands would have been much less. Nor does he state whether the values estimated are those when the easements were first granted or as of the present time, after the values have been enhanced by the building of a highway system throughout this state.

This court, in the State Land case (*Conway*), *supra*, made two fundamental determinations:

1. It was held that as a matter of law the grant of

nonrental rights of way for the purpose of constructing the kind of roads involved in that case resulted in an over-all benefit to school trust lands.

2. It was held that where there is such a benefit the State Land Department must grant the requested rights of way free of charge.

We certainly agree that, in making a determination as to whether the proposed construction would result in an over-all benefit to trust lands, such determination must be made upon all of the trust lands as a whole, rather than taking them parcel by parcel. The Land Commissioner, in his memorandum, asked the question: If highway construction by state and counties improves the lands that the highways cross, why, then, is it ever necessary for compensation to be paid to a private land owner when his land is taken? Private lands are in a different category from these trust lands. Private lands are in relatively small tracts, and the value of the right of way to the owner is frequently out of proportion to the benefit to him, while, as we have held, the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an over-all benefit to the trust lands as a whole. The value of these large tracts of trust lands is greatly enhanced by the building of a highway system through and to the same. The two situations are not analogous.

In the Grossetta case, *supra*, we said:

"... We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for

the convenience and comfort of the owners and patrons of such institutions. In *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, 5, the court said:

"The questions in the case concern the right of the Legislature to give to the board of land commissioners the power which it has assumed to exercise under this statute [statute similar to our section 3005, *supral*. We think it proper first to consider the contention that the granting of the right of way is prohibited by several provisions of the acts of Congress granting the lands to the state and of the state Constitution. [Here the court sets out the provisions of the Enabling Act with reference to the grant of land to the state of Wyoming and the terms of the acceptance of such grant, which are very much like ours.] However, we cannot for a moment believe that it was intended that the restriction on the use of the lands should interfere with the establishing of public roads across them.

"The power of a state to provide highways for public use has been likened to the power of taxation and said to be well-nigh as essential to the existence of government. Courts do not hold that the power has been surrendered except in those cases where there appears the deliberate purpose of the state to abandon it. *Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390, 405, 32 S. Ct. 267, 56 L.Ed 481, quoting the following forceful language of Mr. Chief Justice TANEY in the *Charles River Bridge v. Warren Bridge* Case, 11 Pet. 420, 547 (9 L.Ed. 773):

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished." . . .

"51 Ariz. at 251, 75 P.2d at 1032

The Land Commissioner contends that the material sites damage the land upon which they are located. Our statutes at the time under which the State v. State Land, supra, decision was made was substantially the same as at the present time. In that case we held:

"We do not find anywhere in the statutes that the legislature has in terms required the state to pay a rental or royalty on the sand, rock, gravel, or natural products from these lands used in the construction of highways. Nor is there any duty imposed upon the land commissioner by the law to collect such rentals or royalties." 62 Ariz. at 255, 156 P.2d at 904

There was no evidence presented in the case in regard to these material sites. It is plain that both the granting of the rights of way and the material sites enable the building of highways, and are of material benefit to the trust lands as a whole, and enhance the value thereof.

ai For the reasons as set forth, we hold that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona.

We, therefore, order that the writ of prohibition be made permanent.

**Ernest W. McFarland, Justice**

**CONCURRING:**

**Lorna E. Lockwood, Chief Justice**

**Charles C. Bernstein, Justice**

**Fred C. Struckmeyer, Jr.,  
Vice Chief Justice**

**Howard F. Thompson, Judge**

(Justice Jesse A. Udall having disqualified himself, Judge Howard F. Thompson sat in his stead.)

\* \* \*

**APPENDIX C****SUPREME COURT  
STATE OF ARIZONA  
PHOENIX**

December 16, 1965

**STATE OF ARIZONA, ex rel  
ARIZONA HIGHWAY DEPARTMENT,****Petitioner,****v.****OBED M. LASSEN, Commissioner,  
STATE LAND DEPARTMENT,****Respondent.****No. 8620**

The following action was taken by the Supreme Court of the State of Arizona on December 14, 1965, in regard to the above-entitled cause:

"ORDER: Respondent's motion for rehearing—  
**DENIED.**"

**FURTHER ORDERED:** Motion to file brief Amicus Curiae—**DENIED.**"

**SYLVIA HAWKINSON, Clerk**  
By L. Brooks  
**Assistant Clerk**

**Darrell F. Smith, Attorney General**  
To Attention: Dale R. Shumway [For Obed M. Lassen & State Land Dept.]

**Gary K. Nelson, Assistant Attorney General [For Petitioner]**

**Lewis Roca Scoville Beauchamp & Linton [For Arizona Education Assn.]**

**Jennings Strouss Salmon & Trask [for Salt River Project Imp. Dist.]**

Westover, Copple, Keddie & Choules [For Welton Mohawk I & D Dist.]

Rawlins, Ellis, Burrus & Kiewit [For Elec. Dists. Nos. 3 & 4, Pinall]

A. Van Wagenen [For Elec. Dists. Nos. 2 & 5, Pinal County]

Richard J. Riley, County Attorney Cochise County, Bisbee, Arizona

E. Leigh Larson, County Attorney Santa Cruz County, Nogales, Arizona

#### **APPENDIX D**

#### **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

**NO. 8620**

**PETITION FOR  
WRIT OF  
PROHIBITION**

**STATE OF ARIZONA, ex rel  
ARIZONA HIGHWAY  
DEPARTMENT,**

**Petitioner,**

**vs.**

**OBED M. LASSEN, Commissioner,  
STATE LAND DEPARTMENT,  
Respondent.**

Petitioner, by and through its attorney, Robert W. Pickrell, The Attorney General, respectfully petitions this Court for a Writ of Prohibition staying further promulgation and/or enforcement by the respondent of Rules and Regulations Governing Rights of Way, November, 1964, a true copy of which is attached hereto as Exhibit "A", insofar as they purport to require the

Petitioner to pay compensation for Rights of Way and Material Sites (see Rule 12 therein), and in support thereof states as follows:

I

The real parties in interest herein are the petitioner and the respondent.

II

This petition is brought before this court under its original jurisdiction as set forth in Art. 6, § 5, Constitution of Arizona, (as amended, November 8, 1960), and is brought initially in this court rather than in an inferior tribunal due to the nature of the controversy, the parties being two agencies of the state, and the need for an immediate clarification of a point of law, the certainty of which is essential to the continued operations of both the petitioner and respondent herein.

III

On November 19, 1964, the respondent filed in the Office of the Secretary of the State of Arizona, a notice of adoption of rules, pursuant to A. R. S. § 41-1002.

IV

Pursuant to said notice, your petitioner presented arguments, both orally and in writing at the hearing set by the respondent on December 14, 1964, at 10:00 o'clock A.M., advising him that under the law of this state/he has no jurisdiction to do what he is attempting to do.

V

The respondent rejected petitioner's petition and ordered that the rules be finally adopted and enforced as written.

VI

While the Administrative Procedure Act, A. R. S. §

41-1001 et seq., provides that the validity of a rule may be tested by a declaratory judgment in the Superior Court of Maricopa County, A. R. S. § 41-1007A, it also specifically does not preclude other remedies for testing the validity of rules so promulgated (A. R. S. § 41-1007B). For the reasons and authority set forth more fully in the memorandum in support of this petition and attached hereto, in this situation, an action at law for declaratory relief could not be either speedy or adequate.

## VII

The relief sought by the petitioner is clearly within the jurisdiction of this court as appears in more detail in the memorandum of authorities attached hereto. Two decisions of this court, which have not been overruled or modified by this court, or abridged by the legislature, clearly and unmistakably deny to the respondent the jurisdiction to require the State of Arizona, by and through its Highway Department, to pay compensation to respondent for rights of way and material sites in and to land under his control and jurisdiction.

WHEREFORE, petitioner prays that this court issue an Alternative Writ of Prohibition to Stay all further promulgation or enforcement, either directly or indirectly, of the rules in question pending final determination of the jurisdictional question by this court, and that by such Alternative Writ, respondent be ordered to show cause why the Alternative Writ should not be made peremptory.

DATED this 14th day of December, 1964.

Respectfully submitted,  
ROBERT W. PICKRELL  
The Attorney General

By: **GARY K. NELSON**  
Gary K. Nelson  
Assistant Attorney General  
Attorneys for Petitioner

**STATE OF ARIZONA** ss.  
County of Maricopa

**GARY K. NELSON**, being first duly sworn on oath, deposes and says: That he is a duly qualified and acting Assistant Attorney General for the State of Arizona authorized to represent the Petitioner herein; that he has read the foregoing Petition for Writ of Prohibition and knows the contents thereof; and that the information alleged therein is true to the best of his knowledge, information and belief.

**GARY K. NELSON**

Subscribed and sworn to before me this 14th day of December, 1964.

**HARRIET D. HUNTER**  
Notary Public

**My Commission expires Sept. 1, 1966.**

**APPENDIX E****IN THE SUPREME COURT  
OF THE STATE OF ARIZONA****STATE OF ARIZONA, ex rel  
ARIZONA HIGHWAY  
DEPARTMENT,****Petitioner,****v.****OBED M. LASSEN, Commissioner,  
STATE LAND DEPARTMENT,****Respondent.****NO. 8620****RESPONSE TO  
PETITION FOR  
WRIT OF  
PROHIBITION**

In response to the Petition for Writ of Prohibition heretofore filed in this matter, the Respondent, OBED M. LASSEN, Commissioner, State Land Department, by and through ROBERT W. PICKRELL, the Attorney General, and DALE R. SHUMWAY, Special Assistant Attorney General, alleges as follows:

**I**

Admits the facts as set forth in Petitioner's petition and states there are no questions of fact to be determined in this matter.

**II**

In addition to the facts set forth in the petition, Respondent submits the following facts which are undisputed by the Petitioner:

1. That the lands under the jurisdiction of the State Land Commissioner were granted by the United States to the State of Arizona "in trust" by an Act of Congress;
2. That the Act of Congress specified subdivisions of

the State of Arizona which would be the beneficiaries of the trust lands;

3. That for all the years since Arizona received these trust lands the Petitioner and other governmental bodies have applied for and received rights-of-way and material sites without compensating the trust therefor;

4. That the Enabling Act, the Constitution of Arizona, and the Statutes set up restrictions as to the administration and/or disposal of the trust lands.

### III

The remedy sought by the Petitioner is inappropriate for either of two reasons:

1. The decisions of this court do not prohibit the requirements set forth in the new rules promulgated by the Respondent, and

2. If, as contended by the Petitioner, two decisions of this court clearly and unmistakably deny to the Respondent the jurisdiction to require compensation for material sites and rights-of-way taken from lands under his jurisdiction, then this court should reexamine these cases in the light of the present requirements for these trust lands.

WHEREFORE, Respondent prays that the Alternative Writ of Prohibition be denied and this court allow Respondent to carry out his duties as trustee as indicated by the new rules.

Respectfully submitted this 18th day of December, 1964.

ROBERT W. PICKRELL  
The Attorney General  
DALE R. SHUMWAY  
Special Assistant  
Attorney General

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**Verification**

**STATE OF ARIZONA**  
County of Maricopa ss.

OBED M. LASSEN, after first being duly sworn upon oath deposes and says: that he is the Land Commissioner for the State of Arizona; that he has read the foregoing Response to Petition for Writ of Prohibition and knows the contents thereof, and that the statements contained in said Response are true of his own knowledge, information and belief.

**OBED M. LASSEN**  
Obed M. Lassen

Subscribed and sworn to before me this 17th day of December, 1964.

**BERNICE CUNUNDSON**  
Notary Public

My commission expires March 14, 1966.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1109~~ 84

OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,

Petitioner,

v.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ARIZONA

BRIEF OF THE STATES OF MONTANA, NEBRASKA,  
NEW MEXICO, NORTH DAKOTA, OKLAHOMA,  
SOUTH DAKOTA, UTAH, WYOMING AS  
AMICI CURIAE IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965

No. 1109

OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,  
*Petitioner,*

v.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF ARIZONA

BRIEF OF THE STATES OF MONTANA, NEBRASKA,  
NEW MEXICO, NORTH DAKOTA, OKLAHOMA,  
SOUTH DAKOTA, UTAH, WYOMING AS  
AMICI CURIAE IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI

The States of Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming, through their Attorneys General, respectfully submit this joint Brief as amici curiae under Rule 42(4) Rules of the Supreme Court, in support of the Petition for a Writ of Certiorari to the Arizona Supreme Court filed by Obed M. Lassen, Commissioner, State Land Department of the State of Arizona.

**REASONS FOR GRANTING THE WRIT****ARGUMENT****I. THE CASE PRESENTS A QUESTION OF SUBSTANTIAL IMPORTANCE AFFECTING THE ADMINISTRATION BY THE STATES OF "TRUST LANDS" GRANTED TO THEM BY THE UNITED STATES UNDER THEIR ENABLING ACTS.**

The States who are parties to this *amici curiae* brief did by their statehood Enabling Acts receive grants of land from the United States.<sup>1</sup> These lands were granted to the respective States for the benefit of public schools and for certain other governmental institutions and functions. By these Enabling Acts Congress prescribed rules for the administration and disposal of such lands. Simply stated, the lands were granted to the States under an express trust for the support of common schools (and other specific institutions and functions) without the right or power of the States to use, dispose of, or alienate the lands except in the manner set forth in the Enabling Acts. Each of these States, by their constitutions, accepted these lands and by such acceptance contracted with the United States that they would administer the lands in accordance with the dictates of the Enabling Acts.

Pursuant to the Enabling Acts, the States, by their constitution and statutes, have set up rules for administration of the lands. Problems have arisen in most of these States regarding the use to which the trust

<sup>1</sup> Montana, Act Feb. 22, 1889 (25 Stat. 676)  
Nebraska, Act April 19, 1864 (13 Stat. 49)  
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North Dakota, Act Feb. 22, 1889 (25 Stat. 676)  
Oklahoma, Act June 16, 1906 (34 Stat. 267)  
South Dakota, Act Feb. 22, 1889 (25 Stat. 676)  
Utah, Act July 16, 1894 (28 Stat. 107)  
Wyoming, Act July 10, 1890 (26 Stat. 223)

lands and the proceeds obtained therefrom could be placed. These problems, however, have been resolved in compliance with the clear mandate of the Acts of Congress.

The decision of the Arizona Supreme Court in *Lassen v. State of Arizona*, Ariz., 407, P. 2d 747, (1965) ignores the trust provisions prescribed by Congress in the Arizona-New Mexico Enabling Act. This decision, if followed in other States, would do violence to the provisions of the Enabling Acts and to the intent and purpose expressly manifest by Congress when the "trust lands" were granted. This case completely ignores the language of the Enabling Act of Arizona and New Mexico<sup>2</sup> as well as case law which is well established in the States represented on this brief. The following decisions from States other than Arizona are in conflict with the decision in the court below:

- (a) This decision conflicts with the principles and is by name a direct rejection of *State v. Walker*, 61 N. Mex. 374, 301 P. 2d 317 (1956). In this case the identical question which was presented in the *Lassen* case under the identical Enabling Act was presented for decision and the New Mexico Supreme Court held that the New Mexico State Highway Commission was required to compensate the trust fund for rights-of-way and construction material that was taken. (See also *State v. Mecham*, 56 N.M. 762, 250 P. 2d 897)
- (b) The decision conflicts with the principles of *State v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910). This case, following the restrictive language of the Montana Enabling Act, held that

<sup>2</sup> 36 Stat. 557, 568-579.

trust lands could not be condemned for dam and reservoir purposes.

(c) In the case of *State ex rel. Ebke v. Board of Educational Lands and Funds of Nebraska*, et al, 159 Neb. 79, 65 N.W. 2d 392 (1954) the Nebraska Court refused to allow a litigant dealing with State-leased land to receive attorneys' fees out of the trust fund. The Court held that the State is required to administer trust lands in accordance with the Enabling Act and Constitution and may not dispose of or alienate the lands or any part thereof except in compliance therewith. (See also, *State v. Platte Valley Public Power and Irrigation District*, 143 Neb. 661, 10 N.W. 2d 631 and *State v. Central Nebraska Public Power and Irrigation District*, 143 Neb. 158, 8 N.W. 2d 841)

(d) Although the recent Arizona case seems to be in accord with *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, *on rehearing*, 31 Wyo. 464, 228 Pac. 642 (1924) that case has been strictly construed as applying only to the granting of rights-of-way to counties under the authority of a statute.<sup>3</sup> During the past three years the Wyoming State Board of Land Commissioner has required the Wyoming State Highway Department to pay to it the value of trust lands taken for both state and interstate highway purposes, such money to be credited to the appropriate permanent trust land funds. This procedure has not been challenged in the Courts of Wyoming.

(e) The decision in the Arizona Supreme Court further conflicts with the analogous decisions in *State Highway Commissioner v. State* 70 N.D. 673, 297 N.W. 194 (1941) and *United States v. Fenton* (D.C. Idaho) 27 F. Supp. 816.

<sup>3</sup> Section 36-204, Wyoming Statutes, 1957

## II. THE DECISION BELOW IS CLEARLY WRONG.

The decision below fails even to refer to this Court's decision in *Ervien v. United States*, 251 U.S. 41, 40 Sup. Ct. 75, 64 L.Ed. 128 (1919). As indicated above, the State of New Mexico, at statehood, received a grant of land in trust for the benefit of schools and for certain other governmental institutions and functions. Shortly thereafter, the legislature of New Mexico passed an act authorizing the expenditure of funds derived from the sale of Enabling Act lands for advertising of the resources and advantages of the state of New Mexico. An action was brought under the New Mexico Enabling Act—an act which is identical to the Arizona Enabling Act—to enjoin such expenditures on the ground that the revenues obtained from the trust lands could be used only for the specific purposes enumerated by Congress in the Enabling Act. This Court reviewed the "advantage or benefit theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it. The Circuit Court Opinion which was approved by this Court is reported at 246 Fed. 277 (8th Circuit 1917). The Circuit Court stated that

"It would be a step further to allow the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the State that are to be advertised, *such as systems of public highways, irrigation, public schools, and the like.*" (emphasis supplied)

By the Decision handed down by the Arizona Supreme Court, Arizona has now taken the very step which this Court struck down in the *Ervien* case. The Arizona Supreme Court in its decision has not so much as men-

tioned the *Ervien* case, although it was repeatedly urged that the Court take note of that decision.

### III. IT IS PROPER TO REVIEW THE DECISION OF THE COURT BELOW.

This case was decided by the court below on an original writ of prohibition, a procedure common in Arizona. See, e.g., Ariz. Const. Art. 6, § 4; *Dean v. Superior Court*, 84 Ariz. 104, 324 P.2d 764 (1958); *Beach v. Superior Court*, 64 Ariz. 375, 173 P.2d 79 (1946); *Loftus v. Russell*, 69 Ariz. 245, 212 P.2d 91 (1950). The question arises as to whether the rule of *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 Sup. Ct. 1409, 91 L.Ed. 1666 (1947), bears on the petition for certiorari.

The answer is No. *Rescue Army* held that this Court would not exercise the jurisdiction it undoubtedly had and determine *constitutional* issues presented by a writ of prohibition. The refusal was grounded upon "a policy of strict necessity in disposing of *constitutional* issues." (Emphasis added.) 331 U.S. at 568. The Court further stated:

"One aspect of the policy's application, it has been noted, has been by virtue of the presence of other grounds for decision. But when such alternatives are absent, as in this case, the application must rest upon considerations relative to the manner in which the *constitutional* issue itself is shaped and presented." 331 U.S. at 573. (Emphasis added.)

Where the issue is non-constitutional, this Court has had no problem in determining cases which come to it without a full record. See, e.g., *Seaboard Line R. Co. v. Daniel*, 333 U.S. 118, 68 Sup. Ct. 426, 92 L.Ed. 580 (1948), and *Steele v. Louisville & N.R. Co.* 323 U. S. 192, 65 Sup. Ct. 226, 89 L.Ed. 173 (1945).

In *Seaboard*, an original action was brought by an interstate rail carrier in the state supreme court to enjoin the state Attorney General from attempting to collect statutory penalties or to enforce statutory provisions against it, on the ground that the carrier had been authorized by the Interstate Commerce Commission to own and operate a railway system without complying with the state laws involved. The state supreme court denied the request for the injunction and dismissed the complaint; the case was reversed on appeal to this Court with no jurisdictional problems. In *Steele*, this Court reviewed a decision on demurrer in a state trial court as to whether the Railway Labor Act imposes a duty upon a labor organization acting under a federal statute as an exclusive bargaining agent of a craft of employees to represent all the employees in the craft without racial discrimination.

Here the question is the construction of the Arizona Enabling Act, 36 Stat. 557, 568-579. There is no other way to bring the issue here. Moreover, it depends on no evidentiary facts—either a highway department can take school trust lands for its right-of-way and material site purposes without compensating the trust funds or it cannot. The matter is properly here.

### CONCLUSION

The decision of the Arizona Supreme Court authorizing the Arizona State Highway Department to take trust lands for highway rights-of-way and material sites without compensation therefor is clearly wrong, as a matter of law. Trust lands held by the State of Arizona as well as the *amici curiae* herein were granted to the States for specific purposes. Any usage of these lands or the natural products thereof for other purposes is clearly a breach of the trust and should not be permitted by this Court. There is today in the Western States an ever-increasing demand by governmental and semi-governmental agencies for usage of trust lands. This decision opens the door for a complete destruction of the trust land theory set up under the state Enabling Acts by the Congress of the United States.

We therefore submit that the Petition for a Writ of Certiorari filed by the State of Arizona should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1109~~ 84

OBED M. LASSEN, COMMISSIONER,  
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BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT  
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The asserted conflicts are non-existent. The holding of the Court below rests upon its resolution of a factual question which was *not* at issue in any of the cases cited. The Arizona Court not only agrees with the holdings of the sister states that trust lands cannot be disposed of except for value, the principle is the same irrespective of which law controls.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

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Petitioner,

vs.  
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ARIZONA HIGHWAY DEPARTMENT,  
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF ARIZONA

The Petitioner urges that the Court should grant certiorari on the ground that the decision of the Arizona Supreme Court conflicts with the decision of the New Mexico Supreme Court in *State ex rel State Highway Commission v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), and with other decisions of other state courts. It is also asserted that there is a conflict "in principle" with a 1919 decision of this Court, *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75.

The asserted conflicts are non-existent. The holding of the Court below rests upon its resolution of a factual question which was not at issue in any of the cases cited. The Arizona Court not only agrees with the holdings of its sister states that trust lands cannot be disposed of except for value; this principle is the major premise from which its opinion proceeds.

Moreover, even if the holdings of the New Mexico and the Arizona Courts were in conflict, and even if the conflict were on a point of law, the issue would not be one which would warrant review by this Court.

## I

### **There is no Conflict Because the Decision of the Court Below Rests Upon a Determination of Fact**

The Enabling Acts of the States of Arizona and New Mexico designate certain lands whose proceeds are to be administered as trust funds for the benefit of specified state institutions. Under the Enabling Acts of these two States, lands so designated are not to be disposed of without "value" being received therefor.<sup>1</sup>

There are various means by which parcels of these trust lands can be used or disposed of so as to enhance the total "value" of the "trust fund." One such means is to charge specific prices for every parcel of land sold, leased, or encumbered. But this is not by any means the only method—nor is it necessarily the most effective —by which this end may be accomplished.

The narrow issue with which the Court below dealt was this: Proceeding from the premise that trust lands may not be disposed of except for value, does the construction of highways in Arizona across certain portions of the total package of Arizona trust lands result in a net value enhancement to such lands taken as a whole? Alternately stated, the question was, is the total bundle

<sup>1</sup> § 28 of the Arizona Enabling Act, 36 Stat. 557, 568, 575, provides in part:

"All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ." (Emphasis added.)

of Arizona trust lands, after a small portion of them has been used for highways, of greater value because of the presence of the highways?

The Court's unanimous holding was that "the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an overall benefit to the trust lands as a whole. The value of these large tracts of trust lands is greatly enhanced by the building of the highway system through and to the same." (Pet. App. B, p. 33.)

In dealing with this factual issue of value enhancement to trust lands in Arizona resulting from the construction of highways, the Court below was not writing on a clean slate, but was simply reaffirming its prior holdings in two cases, *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938) and *State of Arizona ex rel Conway v. State Land Department*, 62 Ariz. 248, 156 P.2d 901 (1945), both of which involved the basic problem of construction of roads and highways across State trust lands. In *State v. State Land Department*, the Court cited "with approval a portion of the opinion [in *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, on rehearing 31 Wyo. 464, 228 Pac. 642 (1924)] as applicable to the question under consideration." Part of the language which the Arizona Court cited with approval is the following:

"For the natural tendency of the grant, [of rights of way for road purposes] reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable

*or rental value.*" (Emphasis added.) 62 Ariz. at 254.<sup>2</sup> In the instant case, the Arizona Court simply declined to overrule its holdings in these two prior cases that as a matter of fact the construction of highways across trust lands in Arizona results in a benefit to these trust lands taken as a whole.

The New Mexico Court in the *Walker* case, this Court in the *Ervien* case, and other courts cited in the petition have held that trust lands may not be disposed of without value having been received therefor. The Arizona Court is in perfect agreement with this principle. The only point of departure between the holdings of those courts and the holding of the Arizona Court in the instant case is that the Arizona Court—proceeding from the major premise that lands may not be disposed of without value having been received in return—made a second determination — a factual determination — which the cases cited by a Petitioner did not make.<sup>3</sup>

Therefore, the cleavage between the results reached

---

<sup>2</sup> Similarly, in its earlier *Grossetta v. Choate* case, the Court had held:

"We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and *not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions.*" (Emphasis added.) 51 Ariz. at 251.

<sup>3</sup> The Petitioner's conclusory assertions to the contrary notwithstanding, the lower Court's decision does not rest upon the difference between a fee and an easement, but rather on its determination that "both the granting of the rights of way and material sites enables building of highways, and are of material benefit to trust lands as a whole, and enhance the value of the land thereof." (Pet. App. B, p. 35.) The determinative question is value enhancement; whether the interest taken is characterized as a fee or an easement is totally immaterial to that question.

by the Arizona and New Mexico Courts rests upon a determination of fact. On that factual issue there is no conflict, because the issue was never considered by the New Mexico Supreme Court. Hence, the issue in this Petition boils down to whether this Court should grant certiorari to review a determination by the Arizona Supreme Court that the use of trust lands in Arizona for the construction of highways in Arizona results in a net increase in the value of the entire package of Arizona trust lands.

The Petition itself points out the real difference between the Petitioner and the Arizona Court:

"Whatever values these splendid new roads may have for the motoring or trucking public, they are in a major degree totally destructive of the use of the land for the primary purpose of the trust. These highways may give vast benefits, and doubtless do, to the interstate traveler but not to the land itself, which is completely destroyed in its usefulness as revenue producing acreage." (Pet. p. 12)

This is colorful language, but it is supported by nothing more authoritative than its own rhetoric. Moreover, the issue to which it is directed is an issue of fact. On that issue the Arizona Supreme Court has held precisely the opposite on three separate occasions.

Even assuming that the factual issue on which the holding in this case depends would warrant review by this Court — and clearly it would not — such a review would be impossible here because the factual determination was not made in this case. As the Petitioner has pointed out, this action arose as an original Writ of Prohibition in the Arizona Supreme Court challenging a ruling by the State Land Commis-

sioner. There was no evidence taken in connection with that ruling by the Land Department on the issue of benefit accruing from the construction of highways. Neither was there a trial in the case. The Court simply reaffirmed its two prior holdings on the question of the effect of highways on the value of trust lands. There is therefore no record which this Court could review for the purpose of ascertaining whether the factual determination upon which the Arizona Court's holding rests is correct or incorrect.

The difficulties of reviewing a decision which rests upon a factual determination—but in which, because of the peculiar way it arose, there is no record—are amply attested by the Petition itself. For example, an assertion that the State Land Department has prepared certain information and has supplied this information to its attorney is hardly an adequate substitute for a record. Similarly, the Petition contains references to alleged statements of intent by various State agencies, as though such statements were part of the record. They are not, because indeed there is no record. These are only a few of the numerous instances in which the Petitioner has found it necessary to make conclusory assertions of fact which are of course not cognizable on this Petition for Certiorari.

By making these bald factual assertions, the Petitioner correctly recognizes that to upset the decision which the Arizona Supreme Court has now affirmed for the third time in twenty-eight years, it must attack the factual basis on which the Court's decision rests. What the Petitioner fails to recognize is that a Petition to this Court for a Writ of Certiorari is too late to start introducing evidence.

## II

### Cases Cited by the Petitioner From Other Jurisdictions are Similarly Not on Point

In not a single one of the State cases cited by the Petitioner and asserted to be in conflict with the decision of the Arizona Court here did the Court go beyond the obvious holding that trust lands may not be disposed of except for value, and consider the further question of whether in fact highway construction results in net value enhancement.

On the other hand, in those instances in which state and federal courts have dealt with this problem, their holdings have been in unanimous accord with the view adopted by the Arizona Supreme Court in this case and on two prior occasions.<sup>4</sup>

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<sup>4</sup> In *Ross v. Trustees of University of Wyoming*, *supra*, the Wyoming Court in speaking of the Enabling Act of that State said that "In acts of that kind we see a Congressional recognition of the public necessity of the improvements thus aided, and a purpose to enhance the value and hasten the settlement of the public lands affected." 222 Pac. at 5.

Similarly, the New Jersey Court, in discussing what uses the State of New Jersey could make of lands designated by that State's Constitution for the Support of schools observed in *Henderson v. Atlantic City*, 64 N.J. Eq. 583, 54 Atl. 533 (1903): [The State] could probably grant a perpetual right to lay out streets or highways through it, regarding the presence of such streets as likely to enhance the value of the property."

*United States v. The Railroad Bridge Company*, 6 McLean 517, Fed. Cas. No. 16,114 (N.D. Ill. 1855) was a case involving a right of way across public lands of the United States which at one time had been reserved for military purposes. The opinion was written by Mr. Justice McLean, an Associate Justice of this Court, who held that such improvements "encourage population, and increase the value of the land. In no respect is the exercise of this power by the state inconsistent with the fair construction of the Constitutional power

(Footnote Continued)

Since it is a decision by this Court, *Ervien v. United States* deserves special mention. A logical reason why *Ervien* was not mentioned by the Court below is that it simply is not on point. It did not involve the construction of any type of improvements—highways or otherwise. Rather, trust funds were to be used for advertising the "resources and advantages of [the State of New Mexico] generally."

If relevant at all, *Ervien v. United States* supports the lower Court's holding. *Ervien* was a suit which was brought by the United States Attorney General, the authority charged with the primary responsibility of enforcing the provisions of the Enabling Acts of Arizona and New Mexico. In the instant case, unlike *Ervien*, the Attorney General has not questioned the State policy involved, even though it is of more than fifty (50) years standing, and was in effect at the very time that *Ervien v. United States* was decided.

Under the operation of the principle that interpreta-

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of Congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value." (Emphasis added.) (The foregoing language was cited in *Ross v. Trustees of University of Wyoming*, on re-hearing, 31 Wyo., 464, 228 Pac. 642, 646 (1924)).

The Supreme Court of Minnesota, in answer to a contention that a statute granting a right of way to railroad companies over school or university lands held by the State was repugnant to a provision in that State's Constitution forbidding the sale of such lands other than by public auction, stated in *Lawver v. Great Northern Ry. Co.*, 112 Minn. 46, 127 N.W. 431, 432 (1910) as follows:

"We doubt the soundness of this contention. The constitutional provision was intended to prevent the secret sale and possible sacrifice for an inadequate price of that portion of the public domain granted to the state for educational purposes. The construction of the railroad across such lands would not only bring them into the market, but add materially to their market value." (Emphasis added.)

tions placed upon a statute by the agency charged with the administration of the statute are entitled to great weight, *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965), the United States Attorney General's tacit acceptance of the practice involved here is further conclusive that the holding of the Arizona Court is correct. Where state practices are truly inimical to the policies of the Congressional Act which became the Arizona and New Mexico Enabling Acts, the agency charged with the enforcement of this Federal statute has taken the proper corrective measures.<sup>5</sup>

### III

#### **This Case Involves the Type of Problem That Should be Left to the Courts of the Individual States**

Finally, even if there were a square conflict on a principle of law, this case would still not involve the type of problem which warrants review by this Court.

While it is true that Enabling Acts are Congressional statutes, they are statutes which are peculiarly pointed toward state, rather than national affairs, and which set policy guidelines not for the nation as a whole, but for

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<sup>5</sup> It is true that § 28 provides that ". . . nothing herein contained shall be taken as a limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

The position taken by the Petitioner here could hardly be said to represent the view of the "State" as to the meaning of the Enabling Act. As amply demonstrated by the positions taken by the parties in this case, there is a divergence of opinion among the subdivisions of the "State" on this problem. Moreover, § 28's express provision that the United States Attorney General is charged with enforcing the provisions of the Act would imply that efforts by the State or by individual citizens to effectuate these policies are to be restricted to the clearest kinds of violations. A practice which has received approval by the Arizona Supreme Court three times over a period of 28 years hardly qualifies.

the particular states. By and large, the problems arising from the interpretation of Enabling Acts are problems of the various states. As a matter of comity as well as sound judicial administration, the bulk of these problems have been and should be left to the courts of the individual states, since those courts are more familiar with the background of the issues and the total contexts in which they arise.<sup>6</sup>

Manifestly, this is such a case. Stated in the most expansive possible terms, the legal question in this case is whether one agency of the State of Arizona must pay another agency of the State of Arizona for lands which are located within the State of Arizona and which the first agency uses for the purpose of constructing highways in Arizona. Formulation of policy involving payments between two Arizona agencies and determination of the question whether as a matter of fact construction of highways in Arizona results in a net benefit to certain Arizona lands, are matters particularly within the capabilities of the Arizona Courts.

### CONCLUSION

For more than a half century, State and county highways have been constructed across trust lands in Arizona without any inter-departmental payments being required. This is the third time that the Arizona Supreme Court has held that this practice does not violate provisions of the Arizona Enabling Act. Each time the Court

<sup>6</sup>The Petition suggests that an amicus brief is to be filed by other states. If in fact any possible issues in this case raise problems applicable to other states, this Court will doubtless have opportunity to consider those issues in the context of a case whose procedural posture makes it appropriate for review.

has acknowledged that construction of highways through such lands results in a net benefit to the trust lands as a whole by making such lands accessible and usable for higher and more remunerative uses.

The issue upon which the holding of the Arizona Supreme Court rests is an issue of fact—an issue which could be reviewed by this Court only if this Court were willing simply to declare by fiat that the Arizona Court was wrong in holding that highways across trust lands in Arizona result in a net benefit to such trust lands. This is precisely the position that the Petitioner has been forced to take in its Petition.

Even if there were questions which warranted a grant of certiorari—and we respectfully urge that there are none—this Court in entertaining a review of this matter would encounter the same problems relating to the lack of a record which are evident from the Petition for Certiorari.

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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THE ATTORNEY GENERAL  
OF THE STATE OF ARIZONA

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In the Supreme Court of the  
United States

OCTOBER TERM, 1966

No. ~~1100~~ 84

OBED M. LASSEN, Commissioner of Public Lands,  
*Petitioner,*

v.

ARIZONA HIGHWAY DEPARTMENT, *Respondent.*

ON PETITION FOR WRIT OF CERTORARI TO THE  
SUPREME COURT OF THE STATE OF ARIZONA

BRIEF OF THE STATE OF WASHINGTON AS  
AMICUS CURIAE

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
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**BRIEF OF THE STATE OF WASHINGTON AS  
AMICUS CURIAE**

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The State of Washington files this brief as *amicus curiae* under sponsorship of its Attorney General pursuant to Rule 42(4), Rules of the Supreme Court.

**INTEREST OF THE AMICUS CURIAE**

For the reasons set forth below, the State of Washington as *amicus curiae* urges that the Court grant the petition of the Arizona Land Commissioner for a writ of certiorari to the Supreme Court of Arizona to review its judgment in *State ex rel. Highway Dept. v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965).

## REASONS FOR GRANTING THE WRIT

Review of the decision of the Arizona Supreme Court in the instant case is of immediate and practical importance to the State of Washington in the administration of the trust lands acquired by it from the United States under the Enabling Act admitting it to the Union as one of the states of the United States, Act of February 22, 1889, 25 Stat. 676, because:

1. The Arizona decision is contrary to the ruling of the state Attorney General (Appendix A, *infra*, pp. 8-21) that the Department of Highways, before constructing highway facilities over granted school lands, is obligated to pay to the common school fund such amount of compensation as a private owner could claim as just compensation for the taking and damaging of his property.
2. The Arizona decision is contrary to the position of the State of Washington in litigation now pending in the United States District Court for the Eastern District of Washington, Northern Division, Civil No. 2619, *United States v. 111.2 Acres of Land*, wherein the state contends that full market value for an easement in granted school lands (as set forth in Appendix B, *infra*, p. 22) must be ascertained and paid to the state before RCW 90.40.050 (Appendix C, *infra*, p. 23) operates to grant that easement to the United States. The state bases its claim on sections 10 and 11 (as amended) of the

Enabling Act (Appendix D, *infra*, pp. 24-25) and article 16, section 1, of the state constitution.\*

3. The Arizona decision has a direct bearing upon litigation now pending in the Superior Court of the State of Washington for Thurston County, Cause No. 36798, *Cole v. Odegaard*, to test the validity of rent-free use of trust land for state park purposes pursuant to the following provision of chapter 56, Laws of Washington 1965:\*\*

Sec. 16. State lands used by the state parks commission as public parks shall be rent free.

Respectfully submitted,

JOHN J. O'CONNELL,  
Attorney General.

HAROLD T. HARTINGER,  
Assistant Attorney General.

*Attorneys for the State of Washington.*

April 7, 1966

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\*Suit was commenced November 20, 1964. However, the United States has not yet announced its position with regard to the issue here noted.

\*\*The plaintiff is the state's Commissioner of Public Lands; the defendants are the Director and members of the State Parks and Recreation Commission.

**APPENDIX A—Opinion of John J. O'Connell,  
Attorney General for the State of Wash-  
ington**

Olympia, Washington  
April 30, 1964

Honorable Bert L. Cole  
Commissioner  
Department of Natural Resources  
Public Lands—Social Security Building  
Olympia, Washington

Honorable Charles G. Prahl  
Director  
Department of Highways  
Highways-Licenses Building  
Olympia, Washington

**GENTLEMEN:**

This is written in response to your requests for the advice of this office regarding the matter of construction of state highway facilities over and across state school lands; i.e., those public lands of the state which are held in trust for the support of the common schools as explained below.

It is our opinion that the Department of Highways has general authority under RCW 47.12.020 and other statutes to locate and construct such highway facilities over and across state school lands, provided (1) the rights in such lands which the Department of Highways seeks to obtain through following the procedure outlined therein are rights which it could obtain by proceedings in eminent domain if the lands in question were privately owned;

and (2) the Department of Natural Resources receives, for the benefit of the common schools, that sum of money which would constitute just compensation to a private owner if his lands were being taken.

RCW 47.12.020 establishes a general procedure to be followed "whenever it is necessary to locate and construct a state highway [including limited access facilities established under chapter 47.52 RCW] over and across any of the public lands of the state of Washington."

It provides for filing by the Highway Commission with the Commissioner of Public Lands of maps showing those portions of public lands of the state which are needed for a particular highway project. The effect of such filings is to reserve to the state the areas thus shown on the maps in the event the lands are sold, leased, or otherwise disposed of.

RCW 47.12.020 contains express requirements pertaining to the payment of compensation by the Highway Commission to the Commissioner of Public Lands (1) for any materials extracted for construction or maintenance from any sand or gravel pits or the like located on state lands, and (2) in the event there be timber on such state lands acquired by the Commission for highway construction purposes.

However, for the reasons hereinafter set forth, we deem this statute to require by implication that compensation also be paid in every case where the

state lands in question—upon or across which state highway facilities are to be constructed—are public lands of the state which are held in trust for the support of the common schools (hereinafter referred to as state school lands).

## I

At the present time, these state school lands total approximately 1,792,496 acres in area, according to the Third Biennial Report of the Department of Natural Resources. The vast majority of these lands were acquired from the federal government under the provisions of our state enabling act; section 10 thereof granted to the state sections 16 and 36 in every township for the support of the state's common school system. The state accepted the grant<sup>1</sup> and now holds legal title to the lands as trustee to fulfill the purposes of the grant. *Toomey v. State Board of Land Commissioners*, 106 Mont. 547, 81 P. (2d) 407 (1938); *State Highway Commission v. State*, 70 N.D. 673, 297 N.W. 194 (1941).

Those state school lands which have not been acquired from the federal government receive their trust character from Article IX, § 3, of our state constitution. By this provision, the framers of our constitution established a fund for the support of the common schools to be derived not only from the sale or lease of federally granted school lands, but also, *inter alia*, from the proceeds of all property es-

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<sup>1</sup>Washington Constitution, Article XVI, § 1.

cheated to the state<sup>2</sup> or willed<sup>3</sup> or granted to the state without specification of purpose.

In this state, education holds a preferred position. Indeed, Article IX of our constitution makes education the paramount duty of the state. Therefore, it is not surprising that the law strictly protects public lands devoted to the support of the common schools. It has been held, for example, that the legislature has no power to provide that title to school lands may be acquired by adverse possession. *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115 (1908); *State v. City of Seattle*, 57 Wash. 602, 107 Pac. 827 (1910). So strong is the law's protection that even the mistakes of public officials administering the lands will not estop the state from collecting that which is due the trust. *State v. Northwest Magnesite Co.*, 28 Wn. (2d) 1, 182 P. (2d) 643 (1947). And if a loss should occur, despite every safeguard, the constitution provides that it "shall be a permanent funded debt against the state \* \* \* upon which not less than six per cent annual interest shall be paid." Article IX, § 5.

## II

The federal government, as grantor of the bulk of the state's school lands, has a clear interest in seeing that the state complies with the terms of the federal grant. *Ervion v. United States*, 251 U. S. 41 (1919); *United States v. Swope*, 16 F. (2d) 215

<sup>2</sup>See also RCW 11.08.060 and 11.08.220.

<sup>3</sup>See also *In re Lienellyn's Estate*, Clark County No. 18323, A.G. File No. 20495.

(C.C.A. 8, 1926). Fortunately for our present purposes, the Enabling Act has been amended so that our conclusions, beyond all question, fall within the terms of the federal grant. Section 11 thereof now contains this provision, which was added by act of May 7, 1932, chapter 172, 47 U.S. Stats. at Large, p. 150:

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

The scope of the term "easements and rights" is broad. The grant may include easements, of course, but it may also include greater rights because greater rights, fee title for example, can be acquired by condemnation. *Miller v. City of Pasco*, 50 Wn. (2d) 229, 310 P. (2d) 863 (1957); *City of Tacoma v. Humble Oil & Refining Co.*, 57 Wn. (2d) 257, 356 P. (2d) 586 (1960). Even apart from this fact, it is clear that more than an easement, instead of less, may be granted. The last clause, relating to the conditions under which the grants may be made, refers to the "estate or interest disposed of." The use of the term "estate" in itself denotes an interest greater than an easement. *Restatement of the Law*

*of Property*, § 9, Comment b, p. 23 (1936); *II American Law of Property*, § 8.22, p. 245 (1952).

The purpose of the amendment to the Enabling Act is almost self-evident. Where school and other trust lands acquired from the government are to be devoted to public use, there is no need that the grant for such purposes be made only after a "public sale" and "advertising", nor is there any need that a minimum sales price be received. (These are the general requirements of section 10 of the Enabling Act.) Congress has affirmatively manifested an intent that the general restrictions upon disposition of school lands are inapplicable where disposition is made under an exercise of power of eminent domain. The state's inherent power of eminent domain<sup>\*</sup> is not interfered with, yet the trust *purpose* is still preserved by the requirement that compensation be made as in the ordinary condemnation.

### III

The state constitution, unlike the Enabling Act, does not expressly exempt the disposition of school lands through condemnation or proceedings in lieu of condemnation from the general restrictions on sale or disposition. Section 2 of Article XVI, for example, prohibits the "sale" of school lands at other than a public auction. It also prohibits sale at a price less than that fixed by a board of appraisers. Section 4 of Article XVI limits the acreage that may

<sup>\*</sup>See *Miller v. City of Tacoma*, 61 Wn. (2d) 374, 302, 378 P. (2d) 484 (1963).

be included in one "sale" and it requires platting, in some cases, prior to that "sale".

Nonetheless, even without an express exemption, most courts have concluded that restrictions such as the ones we have pointed out need not be complied with where school lands are taken for public use through the power of eminent domain. *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho 695, 151 Pac. 998, 1001 (1915); *Ross v. Trustees of University*, 30 Wyo. 433, 222 Pac. 3 (1924); 31 Wyo. 464, 228 Pac. 642, 646-7 (1924); *Grossetta v. Choate*, 51 Ariz. 246, 75 P. (2d) 1031 (1938); *Imperial Irrigation Co. v. Jayne*, 104 Tex. 395, 138 S.W. 575, 583-7 (1911); *State v. Walker*, 61 N.M. 374, 301 P. (2d) 317 (1956); *State v. Platte Valley Power and Irrigation District*, 143 Neb. 661, 10 N.W. (2d) 631 (1943). Contra, *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910).

This has been the view of our own court. In 1911, the supreme court upheld the taking of an easement in school lands by condemnation for street purposes. *Roberts v. City of Seattle*, 63 Wash. 573, 116 Pac. 25 (1911). Eleven years later, in 1922, it permitted condemnation of fee title for a hydroelectric project. *City of Tacoma v. State*, 121 Wash. 448, 209 Pac. 700 (1922). These early decisions were recently confirmed where school lands were taken by the city of Seattle to protect its municipal watershed. *City of Seattle v. State*, 54 Wn. (2d) 189, 338 P. (2d) 126 (1959).

The implied exemption from general constitutional restrictions on the disposal of school lands applies, too, even where there are no proceedings in court and the entire matter is handled administratively. The court assumed this proposition without question in *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn. (2d) 545, 554, 119 P. (2d) 694 (1941). There the court pointed out that the administrative grant of logging road rights of way was the exclusive method to acquire such easements over state school lands. The court accepted the proposition without question, too, in *State ex rel. Washington Water Power Co. v. Savidge*, 75 Wash. 116, 134 Pac. 680 (1913),<sup>4</sup> a case involving the acquisition of rights to overflow and impound waters on state school lands.

The decisions in the *Polson Logging Co.* and *Washington Water Power Co.* cases, *supra*, are undoubtedly correct. The power of eminent domain is an inherent power of government; it is not derived from the constitution, but is limited by it. *Miller v. City of Tacoma*, *supra*. Where private property is taken by condemnation, public use and necessity involves a judicial rather than an administrative determination because our constitution makes it so. Article I, § 16 (Amendment 9), Washington state constitution. But where public property is taken, the determination of public use and necessity may be made either by judicial proceedings or

<sup>4</sup>The supreme court records disclose that the lands in question were school lands.

administrative proceedings, as the legislature may choose, because the state's power of eminent domain over public property is not limited by any constitutional provision. *State ex rel. Mason County Power Co. v. Superior Court*, 99 Wash. 496, 500, 169 Pac. 994 (1918).

However—and we now reach the crucial point—it is beyond dispute that full compensation must be made when school lands are devoted to nonschool purposes, as in the case where they are taken for highway uses. *State ex rel. State Highway Commission v. Walker*, 61 N.M. 374, 301 P. (2d) 317 (1956); *State v. Platte Valley Public Power and Irrigation District*, *supra*; *State ex rel. Johnson v. Central Nebraska Public Power and Irrigation District*, 143 Neb. 153, 8 N.W. (2d) 841 (1943). Any other holding would frustrate the basic purpose of the school land trust. Our Thurston county superior court so held when it entered judgment permanently enjoining the use of school lands for park purposes where no provision was made to compensate the common school fund for which the lands were held. *Showalter v. Martin*, Thurston County No. 15380, A.G. File 6395. The attorney general who defended the action did not deem the arguments against the trial court's ruling sufficiently meritorious to justify an appeal. Undoubtedly our supreme court would recognize the duty to make compensation if such a case were before it. In the past, it has gone out of its way to point out that compensation would be paid

in those cases where it upheld the use of school land for street and park purposes. Cf. *Roberts v. City of Seattle*, 63 Wash. 573, 575-6, 116 Pac. 25 (1911); *State ex rel. Garber v. Savidge*, 132 Wash. 631, 233 Pac. 946 (1925).

On the other hand, it is our opinion that the duty to make compensation is satisfied when the amount of the compensation is equal to that which would be deemed just compensation to a private owner. It is familiar condemnation law that benefits may be offset against damages. *In re Queen Anne Boulevard*, 77 Wash. 91, 137 Pac. 435 (1913); *Town of Sumner v. Fryar*, 146 Wash. 607, 264 Pac. 411 (1928). This same principle would, therefore, be applicable where state school lands are acquired for public use by the Highway Department.\*

#### IV

In addition to the authority existing pursuant to RCW 47.12.020, *supra*, to construct state highway facilities on or across state school lands *upon payment of just compensation to the Department of Natural Resources for the benefit of the common schools as aforesaid*, the Highway Commission has

\*In the following cases the court upheld statutes granting easements without compensation where the grant of the easements benefited the lands: *Grossetta v. Choate*, *supra*; *Ross v. Trustees of University*, *supra*; *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, *supra*; *Imperial Irrigation Co. v. Jayne*, *supra*.

\*A non-expressed condition which, as indicated in the preceding pages of this letter must be read into RCW 47.12.030 by implication in order to save the statute from being a nullity. See *Hazelrigg v. Penitentiary Commissioners*, 184 Ark. 154, 40 S.W. (2d) 996 (1931); *Smallwood v. Jeeter*, 42 Idaho 169, 244 Pac. 149, 152 (1926); *Young v. University of Kansas*, 87 Kan. 239, 124 Pac. 150, 158 (1912); *State v. Pay*, 45 Utah 411, 146 Pac. 300, 304 (1915).

authority to condemn public property through judicial proceedings. *State ex rel. Eastvold v. Superior Court*, 44 Wn. (2d) 607, 269 P. (2d) 560 (1954); cf. *State ex rel. Puget Sound etc. Ry. Co. v. Joiner*, 182 Wash. 301, 47 P. (2d) 14 (1935). Such suits, if commenced against state school lands, are defended by the commissioner of public lands. (RCW 8.28-010, 79.01.736). The authority to acquire an interest in school lands by formal condemnation proceedings also justifies a settlement of the matter without intervention of the court, by stipulation between the highway commission and the commissioner of public lands or by agreement executed by the parties outside the court. The power to do this is implied; the law does not require the performance of useless acts (in this case a trial where no trial is needed). Cf. *Reiter v. Wallgren*, 28 Wn. (2d) 872, 877, 184 P. (2d) 571 (1947). Public policy favors the settlement of disputes without litigation. *Warburton v. Tacoma School District*, 55 Wn. (2d) 746, 350 P. (2d) 161 (1960); *Abrams v. City of Seattle*, 173 Wash. 495, 23 P. (2d) 869 (1933); *Christie v. Port of Olympia*, 27 Wn. (2d) 534, 179 P. (2d) 294 (1947); *City of Bellingham v. Whatcom County*, 40 Wn. (2d) 669, 245 P. (2d) 1016 (1952); *City of Seattle ex rel. Dunbar v. Dutton*, 147 Wash. 224, 265 Pac. 729 (1928).

The highway commission may also acquire school lands for highway purposes under the provisions of RCW 79.01.414. The statute reads:

The department of natural resources may grant to any person such easements and rights in state lands, tidelands, shorelands, oyster reserves, or state forest lands as the applicant applying therefor may acquire in privately owned lands through proceedings in eminent domain. No grant shall be made under this section until such time as the full market value of the estate or interest granted together with damages to all remaining property of the state of Washington has been ascertained and safely secured to the state.

The "person" to whom rights and interests may be granted includes the state itself. By statute and judicial decision (RCW 1.16.080; *Spear v. City of Bremerton*, 90 Wash. 507, 510, 156 Pac. 825 (1916)), the word "person" when used in a legislative act will include public bodies as well as natural persons unless the act as a whole evidences a contrary legislative intent. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 137, 32 Pac. 1002 (1893). In remedial legislation especially "person" will be interpreted broadly to accomplish the purposes of the statute. *State ex rel. Attorney General v. Seattle Gas Co.*, 28 Wash. 488, 493, 68 Pac. 946 (1902). RCW 79.01.414 is remedial legislation. Most public bodies do not have the power to condemn state lands. The statute thus serves as a substitute for this nonexistent right. (There is obvious need to devote public lands to public use from time to time. The vastness of these holdings guarantees this. The Department of Natural Resources administers 627,329.19 acres of state forest lands and 2,164,679.23 acres of other public lands.

Department of Natural Resources, Third Biennial Report (Statistical Supplement), 1960-1962, pp. 36 and 49)

## V

Our preceding remarks may be fairly summarized in this way:

1. State school lands are held in trust by the state for its common schools. The trust is imposed by the terms of the Enabling Act under which most school lands were acquired from the federal government and it is confirmed by constitutional provision.

2. Restrictions as to the manner and circumstances under which school lands will be disposed of—or put to nonschool uses—do not apply where school lands are taken for a public use in the exercise of the state's inherent power of eminent domain. The power of eminent domain may be exercised by judicial proceedings or it may be exercised under administrative proceeding taken in lieu of condemnation.

3. In every case where school lands or an interest in school lands is diverted from its trust purpose, compensation must be made to the Department of Natural Resources for the benefit of the common school fund. The amount of compensation is that which a private owner could claim as just compensation for the taking and damaging of his property.

4. No additional legislation is needed to permit the Department of Highways to acquire school lands from the Department of Natural

Resources for highway uses, nor is additional legislation needed to authorize payment of just compensation for such acquisition.

We trust that the foregoing advice will be of assistance to you.

Very truly yours,

JOHN J. O'CONNELL,  
Attorney General.

PHILIP H. AUSTIN,  
Assistant Attorney General.

**APPENDIX B—Easement Sought by the United States in Trust Lands**

A perpetual exclusive easement for a site for a reservoir and for the construction, operation, maintenance, and control of a reservoir thereon, including the right to control access over and the exclusive possession and use for reservoir purposes of all of the following described real estate situated in Ferry County, State of Washington:

The Northwest Quarter of the Northwest Quarter ( $NW\frac{1}{4}$   $NW\frac{1}{4}$ ), the South Half of the Northeast Quarter of the Northwest Quarter ( $S\frac{1}{2}$   $NE\frac{1}{4}$   $NW\frac{1}{4}$ ); the South Half of the Northwest Quarter of the Northeast Quarter of the Northwest Quarter ( $S\frac{1}{2}$   $NW\frac{1}{4}$   $NE\frac{1}{4}$   $NW\frac{1}{4}$ ); Lot 2, excepting therefrom the South 800 feet of the West 900 feet; and Lot 5, excepting therefrom the North 660 feet of the West 660 feet; all in Section 16, Township 35 North, Range 37 East, W.M.

**APPENDIX C—RCW 90.40.050**

When the notice provided for in RCW 90.40.030 shall be given to the commissioner of public lands the proper officers of the United States may file with the said commissioner a list of lands (including in the term "lands" as here used, the beds and shores of any lake, river, stream, or other waters) owned by the state, over or upon which the United States may require rights-of-way for canals, ditches or laterals or sites for reservoirs and structures therefor or appurtenant thereto, or such additional rights-of-way and quantity of land as may be required for the operation and maintenance of the completed works for the irrigation project contemplated in such notice, and the filing of such list shall, constitute a reservation from the sale or other disposal by the state of such lands so described, which reservation shall, upon the completion of such works and upon the United States by its proper officers filing with the commissioner of public lands of the state a description of such lands by metes and bounds or other definite description, ripen into a grant from the state to the United States. The state, in the disposal of lands granted from the United States to the state, shall reserve for the United States rights-of-way for ditches, canals, laterals, telephone and transmission lines which may be required by the United States for the construction, operation and maintenance of irrigation works. [Enacted as Laws of Washington 1905, ch. 88, § 5, p. 182.]

**APPENDIX-D—Enabling Act of the State of Washington, Sections 10 and 11**

Sec. 10. That upon admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.  
[Act of February 22, 1889, 25 Stat. 676, at 679.]

Sec. 11. That all lands granted by this Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally

valuable for grazing purposes for not less than \$5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, \* \* \*

The said lands may be leased under such regulations as the legislature may prescribe; \* \* \*

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

\* \* \*

[Act of February 22, 1889, 25 Stat. 676, at 679-80, as amended by Act of May 7, 1932, 47 Stat 150.]

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**IN THE SUPREME COURT OF THE UNITED STATES**  
October Term, 1965

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JOHN F. DAVIS, CLERK

No. [REDACTED] 84

OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

BRIEF OF PETITIONER

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1965

**No. 1109**

**OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,**

Petitioner,

*vs.*

**THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,**

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA**

**BRIEF OF PETITIONER**

**Opinion**

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 99 Ariz. 161, 407 P.2d 747 (1965), and reprinted R. 33.

**Jurisdiction**

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a civil case. The decision of the Supreme Court of Arizona was filed on November 12, 1965 (R. 34), and rehearing was denied on December 14, 1965 (R. 56). A petition for certiorari was granted on May 2, 1966, the case being placed on the summary calendar (R. 57). At issue is whether Arizona may permit lands granted to the State of Arizona in

trust for the benefit of the public schools and other designated public purposes under the New Mexico-Arizona Enabling Act, 36 Stat. 557, 568-79 (1910), as amended, to be taken by the State Highway Department for rights of way and material sites, without compensation. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

#### Statute Involved

The statutory provisions involved are first, the congressional provisions, Sec. 20, Ninth, and Secs. 24-28 of the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, 572-75, as amended. The statute is set forth in Appendix A and the essential language of Sec. 28 is as follows:

"[A]ll lands hereby granted . . . shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . .

"Disposition of any said lands . . . for any object other than for which such particular lands . . . were granted or confirmed . . . shall be deemed a breach of trust . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void. . . .

"Nothing herein contained shall be taken as in limitation of the power of the State or any citizen thereof to enforce the provisions of this Act."

Sec. 20, Ninth, is as follows:

"Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

"All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress."

Second, the state provisions, Article X, Sections 1 and 2 of the Arizona Constitution, 1 A.R.S. p. 154, are as follows:

"§1. Acceptance and holding of lands by state in trust

Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"§2. Unauthorized disposition of land or proceeds as breach of trust

Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust."

**Question Presented**

Whether the decision of the Arizona Supreme Court permitting public lands that have been granted to the State of Arizona in trust under the New Mexico-Arizona Enabling Act 36 Stat. 557 (1910), as amended, for specified public purposes, to be taken by the state highway department for highway

rights-of-way and material sites without compensation of the trust, violates the terms of that act.

### Statement

#### *A. The Statute and Its Background.*

It has been the national policy ever since the Northwest Ordinance of 1787 that Congress, in control of the public domain, has by compact with the territories and newly admitted states encouraged and fostered the development of education within them.<sup>1</sup>

This policy in the late 19th century took the usual form of a provision in each state enabling act that the proceeds of the sale of designated public lands were reserved for specified public purposes, primarily educational. These lands were to be sold at some minimum price and the proceeds held in trust for those purposes. Typical of this type of legislation is the act admitting North Dakota and Montana,<sup>2</sup> two of the amici here; and this was commonly construed as amounting to a trust of the land itself. See, e.g., *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941); *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910).

When the time came to admit New Mexico and Arizona a few years later, there had been recent scandals concerning land sales which made the Congress consider legislation that would provide even more specific and greater protection of the public

<sup>1</sup> Sec. 14 (Article III) of the Northwest Ordinance of 1787 provided: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged . . ." Act of July 13, 1787, Rev. Stat. at p. 15, (2d ed. 1878).

<sup>2</sup> See Act of Feb. 22, 1889, ch. 180, Sec. 11, 25 Stat. 679-80. See also the enabling acts of Utah, Act of July 16, 1894, ch. 138, Secs. 8-10, 28 Stat. 109-10, and Wyoming, Act of July 10, 1890, ch. 664, Secs. 4-5, 26 Stat. 222-23.

lands.<sup>3</sup> For this reason, although the Arizona-New Mexico Enabling Act passed the House with the traditional trust fund pattern,<sup>4</sup> when the act reached the Senate a substitute act went further and not merely put the funds from the sale of lands in trust but also expressly placed in trust the lands themselves. Details of the legislative history leading to this decision will be set forth in the argument portion of this brief. In summary, the statute (set forth in the "Statute Involved" section of this brief and in the Appendix) provided that the lands themselves "shall be by the said State held in trust"; every disposition of the lands for any purpose other than the trust purpose was declared to be "breach of trust." All sales, leases, conveyances, contracts "concerning any of the lands hereby granted or confirmed, or the use thereof" not in conformity with the statute were declared to be "null and void." By Section 20, Ninth, of the Enabling Act Arizona was expressly required to accept this trust as a condition of statehood and by Article X of its own Constitution, Arizona accepted the trust.

The purposes for which the lands were placed in trust were "for the support of common schools" and for a number of other

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<sup>3</sup> By the Act of June 21, 1898, ch. 489, 30 Stat. 484, extensive land grants were made to the Territory of New Mexico for supporting the common schools, erecting public buildings, and providing for a university and agricultural college. The sales and leases of these lands were to be made in a designated manner, and limitations were placed upon the amount of timber land that could be leased to any one person, corporation, or association. The territorial authorities violated these provisions with respect to the timber lands, and in 1908 the Department of Justice began several suits, known as the "tall timber" cases, against the offending parties. In 1908 a bill was introduced, and failed to pass, that would have ended those suits, and at the time the 1910 New Mexico-Arizona Enabling Act was considered by the Senate Committee on the Territories, these suits were still pending. See. Rep. No. 454, 61st Cong., 2d Sess. at 19-20 (1910); *Murphy v. State*, 54 Ariz. 338, 181 P.2d 336, 345 (1947).

<sup>4</sup> See H. R. Rep. No. 152, 61st Cong., 2d Sess. (1910); 45 Cong. Rec. 714 (1910). The text of the bill appears at 45 Cong. Rec. 702-05 (1910).

purposes;<sup>5</sup> and Sec. 28 prescribed that none of the lands should be sold or leased, "in whole or in part except to the highest and best bidder at public auction," and there was to be "no sale or other disposal" of the lands at less than an appraised value. All proceeds were to be duly protected.<sup>6</sup>

*B. Practice of Arizona, New Mexico, and Other States in Respect to Highways and Public Works.*

Questions have arisen under the New Mexico-Arizona Enabling Act and under the similar statutes in other jurisdictions as to whether trust lands may be taken for a miscellany of public uses, including highways, without compensation to the trust funds. Arizona, almost alone, has held that such lands may be taken without compensation.

*1. Arizona practice.*

In *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Arizona Supreme Court held that the Enabling Act did not prohibit the construction of a county highway across school lands since the Enabling Act did not limit the power of the

<sup>5</sup> Other specific purposes provided in the statute are for: university purposes, legislative, executive, and judicial public buildings, penitentiaries, insane asylums, schools and asylums for the deaf, dumb, and blind, miners' hospitals, state charitable, penal and reformatory institutions, agricultural and mechanical colleges, school of mines, and payment of certain county bonds, with the remainder of lands and proceeds not used for these purposes to become a part of the permanent school fund. See Sec. 25 of the Enabling Act. Of the 10,790,000 acres granted to the State for all designated uses, over 9,180,000 acres are for various educational purposes. See Arizona State Land Commissioner, Annual Report 28 (1965).

<sup>6</sup> Congress amended the Enabling Act by the Act of June 2, 1951, ch. 120, 65 Stat. 51, (1951), in various ways broadening the leasing power to permit, for example, development of petroleum products without dealing directly with the matters involved in the instant case. The complications of the statute will be reserved for the argument portion of this brief. The amendment was passed at the request of the Arizona Legislature, which amended its state constitution to conform; 1 A.R.S. 155, 156. Other amendments are discussed in the argument portion of this brief.

legislature to authorize grants of right-of-way easements over public lands for public highways. In *State ex rel. Conway v. State Land Dep't*, 62 Ariz. 248, 156 P.2d 901 (1945), the State Land Commissioner was held not entitled to receive or collect payment for, and the Highway Department was not required to purchase or lease, school and institutional lands or their natural products used for establishment, construction, maintenance or repair of state highways. The Commissioner was required to issue, upon proper application, necessary permits to enable the Highway Department to perform its duties respecting the administration of state highways.<sup>7</sup>

The aggregate school lands in Arizona are in excess of 9,180,000 acres.<sup>8</sup> The acreage taken for material sites and state and federal highway purposes between 1956 and 1965 was 40,173.88 acres with a total estimated value of \$9,892,700.17.<sup>9</sup> As the present case indicates, the demands so far made are, if the practice is permitted, only the beginning. As the record shows, the Highway Department's position is supported in the instant case by various utilities, water companies, and electrical districts

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<sup>7</sup> This latitudinarian attitude is not the usual Arizona approach, which is to protect the lands and their proceeds. Thus the Arizona court has also held that the legislature has no power to intermeddle with the duties of the state treasurer as trustee of the proceeds of sales of public lands, that the provisions of the Enabling Act are controlling as to the disposition of lands acquired on foreclosure, and that conveyances in any manner other than that provided by the Enabling Act are void. See *Murphy v. State*, 54 Ariz. 338, 181 P.2d 336 (1947). The opinion in that case carefully considered and applied the legislative history of the Act to conclude that severe restrictions on the disposition of trust lands were intended, and that those restrictions prevailed over any attempted relaxation of them by the legislature.

<sup>8</sup> See *Arizona State Land Commissioner, Annual Report 28* (1965).

<sup>9</sup> This information has been obtained from the Arizona State Land Department. At the inception of the present case, the Land Commissioner compiled a survey of the value of all State trust lands, based upon the values of adjoining lands.

whose claims to similar privileges follow the Highway Department (R. 22-34).

On the other hand, the practice in Arizona of taking easements without compensation has not been uniform. Federal agencies have obtained rights-of-way for transmission lines across state trust lands and have compensated the state, based on the appraised value of the lands.<sup>10</sup> Various state agencies have also leased or purchased rights of way over trust lands.<sup>11</sup>

## 2. New Mexico practice.

The New Mexico practice under the identical federal statute is the exact opposite of that of Arizona; see *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), which expressly holds that the highway department may not make uncompensated use of trust lands. Under the New Mexico practice, "The New Mexico Land Office conveys such rights-of-way and material sites for so long as they are used for highway purposes. This is done without competitive bid and is compensated for at an appraised price. So far, this

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<sup>10</sup> The U.S. Bureau of Reclamation has taken a site for its Pinnacle Peak Microwave Station under Civil Action No. 5473-PHX; a right of way through Sections 9 and 10, T4N, R4E, under Civil action No. 4847-PHX; a transmission line from Four Corners to Phoenix under Civil Action No. 773-PHX; and a transmission line known as the Lake Mead-Liberty line. The Bureau of Indian Affairs has secured a transmission line and a substation in Pinal County. This information is taken from the records of the Arizona State Land Department and the civil action references are to dockets in the Federal District Court in Phoenix.

<sup>11</sup> The bases of these transactions have been lump sum rental, not subject to reappraisal (e.g., certain Maricopa County Flood Control District, Graham County, and City of Flagstaff rights of way); sales at public auction (City of Tucson rights of way); rental paid annually (e.g., City of Kingman, Pinal County Electrical Dist. No. 5, Mohave County Board of Supervisors); and ten years rental paid in advance (e.g., Graham County Board of Supervisors, City of Kingman, Florence Area Watershed Flood Control District). These transactions are listed in the public records of the Arizona State Land Department.

compensation has been mutually agreed upon by the parties in each instance."<sup>12</sup>

### *3. Practice in other states.*

The Arizona practice accords with the decision in *Ross v. Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3 (1924), but as the brief of Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming as amici curiae on the petition for certiorari shows, p. 4, this Wyoming decision does not in fact accord with the current Wyoming practice, which has recognized that the *Ross* decision does not apply to highways of the magnitude of state highways. Conflicts of the Arizona practice with decisions of other states were set forth in the petition for certiorari and in the amicus brief and will be more fully set forth in the argument section of this brief. Nebraska law expressly provides that school lands, if needed for highway purposes, shall be taken by eminent domain; Neb. Rev. Stat. Secs. 72-213,-221. For details of the mechanics, see Neb. Rev. Stat. Secs. 72-224.02,-224.03. South Dakota similarly provides for an appraisal and payment system; see, e.g., S.D. Code Sec. 28-0108 (Supp. 1960).

### *4. Events leading to the instant litigation.*

In 1964, the State Land Commissioner, Arizona's officer charged with the administration and protection of public lands, issued a regulation,<sup>13</sup> under which highway rights-of-way and

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<sup>12</sup> Letter from Office of Commissioner of Public Lands of New Mexico to Arizona Special Assistant Attorney General July 5, 1966.

<sup>13</sup> The text of the regulation is:

"State and County highway Rights of Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122."

Proposed Regulation of  
State Land Commissioner, Rule 12.  
(R. 11-12)

material sites might be granted by the Land Department on the basis of appraisal and payment. The Arizona Highway Department, after administrative proceedings, filed an original proceeding in the Arizona Supreme Court to prohibit the Commissioner from enforcing the regulation. The Supreme Court of Arizona granted the writ of prohibition on the ground that the Enabling Act did not require payment for the taking of trust lands by the Highway Department. This petition for certiorari is taken from that decision.

In the Supreme Court of Arizona, the challenging party was the State Highway Department, supported by various public utilities which contended that they also were State governmental subdivisions; the defending party was the State Land Department.<sup>14</sup>

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<sup>14</sup> It will be observed that the contest is thus both in form and in very real substance between two different agencies of the State of Arizona, the Attorney General of the State being the common lawyer for both. Under Arizona law, the Attorney General, a county attorney, or a special counsel under the direction of the Attorney General represents the Land Department in actions relating to State lands, A.R.S. Sec. 37-102(C). The Attorney General also represents the Highway Department, A.R.S. Sec. 18-114. Where the interest of State agencies have collided, it has been held proper for the Attorney General, through his deputies, to represent both sides in the controversy; see *State ex rel. Conway v. Hunt*, 59 Ariz. 256, 126 P.2d 303, *rev'd on rehearing on other grounds*, 59 Ariz. 312, 127 P.2d 130 (1942), provided that he is acting within the statutory scope of his authority. See *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960). To insure that this is an absolutely adversary proceeding, the Attorney General has appointed Mr. John P. Frank, Mr. Paul G. Ulrich, and Mr. Dix W. Price as special counsel in this cause. In addition to being an attorney, Mr. Price is the Executive Secretary of the Arizona Education Association and Mr. Frank and Mr. Ulrich are compensated entirely in this matter by the Arizona Education Association. The defense of the trust lands, of which school lands comprise by far the largest portion, has thus been assigned in part to a completely independent teachers' organization of the State with a vital interest in the future of the schools. The Arizona Education Association is the professional association of fifteen thousand teachers and school administrators in the State, comprising eighty-five per cent of all Arizona educators. Throughout its history, the Associa-

The decision in the court below followed the earlier Arizona cases previously cited. The essence of the argument as advanced by that court at the present time is two-fold (R. 39-40):

(a) Giving lands for rights-of-way is not a "disposition" because what is taken is less than a fee estate.

(b) The court takes judicial notice that "good highways throughout a state increase the value of the lands." Since there is "overall benefit to school trust lands" by the building of highways, and since there are large tracts of trust lands left, the granting of rights-of-way and of material sites "are of material benefit to the trust lands as a whole, and enhance the value thereof." (R. 42).

This petition was duly taken as detailed in the jurisdictional statement of this brief.

#### Summary Of Argument

The court below has held that a state highway department may take school trust lands, granted to the state in trust under its enabling act by Congress, without compensation. The reasoning of the court below is synthesized by it in a sentence: "The respective rights of way for these highways take less than a fee estate, and there is no disposition of the trust areas, and the trust and its beneficiaries are not deprived of anything of value." (R. 39-40).

This is error in each respect. These lands were given in trust, a trust that was accepted by the state. It is immaterial whether the right of way be regarded as a fee or an easement; the land is lost to the trust in either case, and the statute covers every

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tion has acted vigilantly to protect the public trust lands. As is developed in the text, strong exponents in the court below favoring the uncompensated taking of the trust lands are public utilities which anticipate extension of this privilege to themselves, see Ariz. Const. Art. XIII, Sec. 7; A.R.S. Sec. 45-938(C), further demonstrating the true adversary quality of these proceedings.

disposition "in whole or in part"; it covers not merely sales but any "other disposal"; it covers "the use" of the land. Under Arizona, as under general law, an easement is an interest in land.

The theory of the court below that the trust lands are "not deprived of anything of value" by the loss of what to date is 40,000 acres of land is based on the "benefit" or "advantage" theory that the resultant roads increase the value of the residual trust lands. But the Enabling Act does not authorize any such substitution, and this Court has expressly held that anticipated side benefits do not permit invasion of the trust lands without payment; *Ervien v. United States*, 251 U.S. 41, 40 Sup. Ct. 75, 64 L. Ed. 128 (1919). Under the rule of strict construction of government grants, in light of the strong legislative history, and in view of numerous decisions interpreting similar acts in other states, the decision and practice of Arizona which stand alone in the country, are simply wrong. For other decisions, see *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956); *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910); *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951), and *State ex rel. Johnson v. Central Neb. Pub. Power & Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841 (1943). While the decision below accords with the theory of *Ross v. Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3 (1924), it conflicts with the practice of that state, since the decision has been construed to be limited to county highways that generally open up previously inaccessible lands.

In addition to the legislative history of this act, repeated acts of Congress either by way of amendment of this Enabling Act or by amendments to others, show that Congress has repeatedly interpreted its own trust legislation as covering less than fee interests and as requiring compensation for land taken — without regard to whether it is taken for a public use.

Petitioner, who by virtue of his office becomes the actual trustee for the school lands in Arizona, does not propose to make public development in the state impossible by locking up the trust lands; he merely asks that the trust be properly paid for the lands taken. For this purpose, he has issued a regulation applying the eminent domain procedures of Arizona to determine the value of lands to be taken. The propriety of such a system, which accords with the usual practice under these acts, warrants approval of his regulation and reversal of the court below.

### Argument

#### *I. Introduction.*

The decision of the court below that school trust lands may be taken for highways without compensation rests on two fallacies. To say that putting a great interstate, multi-lane boulevarded highway across school lands is not a "disposition" because less than a fee is taken is to make an artificial and valueless distinction. To say that lands need not be paid for because some other lands will gain in value from an anticipated increase in prosperity of the state due to highway construction is to make a substitution of values which Congress has not permitted. Perhaps Congress might have enacted a law by which trust lands could be distributed in return for the anticipated joys of some future prosperity; but Congress required instead a cash in hand approach with such absolute precision that nothing else will do.

#### *II. For Present Purposes, the Distinction Between an Easement and a Fee Interest in the Public Lands is a Distinction without a Difference.*

The Arizona cases have assumed that somehow there is a profound legal difference for purposes of this statute between the taking of an easement, which a highway right-of-way is called in Arizona, and the taking of fee title as is the practice, for

example, in North Dakota. If there were any merit in such a distinction, it would make too much depend on form. If a super highway with tons of concrete lies upon the ground or excavations for materials are made, the use of land is just as total whether it is called an easement or a fee. The practical consequences are the same.

An easement, under Arizona law as elsewhere,<sup>15</sup> is an interest in real property.

"The right to possess, to use and to enjoy land upon which an easement is claimed remains in the owner of the fee except insofar as the exercise of such right is inconsistent with the purpose and character of the easement . . . . An easement is a right which one person has to use the land of another for a specific purpose . . . . It is distinguished from the occupation and enjoyment of the land itself." *Etz v. Mamerow*, 72 Ariz. 228, 233 P.2d 442, 444 (1951).

But these esoterica of real property theory, interesting though they may be in the abstract, are of no moment here. Nothing in the governing statute suggests that Congress meant to apply any different rule to easements than to outright sales. It is, after all, the lands which are put in trust under this statute. By virtue of Sec. 28, of the Enabling Act, the lands may be "disposed of in whole or in part only" as provided in the statute. The provisions of the act run to both sales and leases. They cover "disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom"; Sec. 28 reaches not merely sales but

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<sup>15</sup> "The right, being an easement, is a part of the realty itself, an interest in land, and is governed by the rules of law with reference to real property." *Miller v. Letzerich*, 121 Tex. 248, 49 S.W. 2d 404, 408 (1932). "An easement is a non-possessory interest in land" (citing Restatement of Property, p. 2903). *Beetschen v. Shell Pipe Line Corp.*, 363 Mo. 751, 253 S.W.2d 785, 786 (1952). "This easement is a real property right enforceable at law . . ." *Bibss v. Sabolis*, 322 Ill. 350, 153 N.E. 684, 685 (1926). "An easement, although an incorporeal right, is an interest in land." *Bakke v. Columbia Valley Lumber Co.*, 49 Wash. 2d 165, 298 P.2d 849, 852 (1956).

also any "other disposal." Moreover, the section provides that "every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, *or the use thereof*" not in conformity with the act shall be null and void. (R. 20). (Emphasis added). Any permit given the Highway Department for use of these lands is so clearly a "sale, lease, conveyance, or contract of or concerning" the lands, and certainly so concerns "the use thereof" as to make further argument unprofitable. The concern expressed by Congress that the public lands be protected for their proper use was so clearly expressed, for the purpose of dealing with every possible disposition of the land, that the argument is simply not available that rights of way were intended to be excluded from this most comprehensive statute.

### *III. The Act Requires Payment of Money in Accordance with Its Terms.*

#### *A. The Statute and the Decisions of This and Other Courts Require Payment for Use of School Lands.*

The short answer to the decision below is that the trust lands were transferred by Congress to Arizona "in trust," "to be disposed of in whole or in part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions . . ." (Sec. 28). Congress required Arizona to accept the trust as a condition of statehood, Sec. 20, Ninth, of the Enabling Act; Arizona did this in Article X of the state constitution.

The lands can thus be "disposed of in whole or in part only" as provided in the act. Any other disposition is a "breach of trust." Nothing in the act even remotely or theoretically authorizes the state to transfer trust lands to its highway department without compensation. Since the act permits "only" the dispositions authorized, and permits disposition only in "the manner" prescribed, this state donation to its Highway Department fails twice—both the

substance and the manner of the disposition are outside any statutory authorization of any kind.

The case is really that simple. The grants to the Highway Department are either authorized under the trust or they are not. Nothing even remotely purports to authorize them. They are, therefore, a "breach of trust."

The Enabling Act does not permit a share in the general prosperity thought to result from highways to be substituted for payment of the specific dollars required to go to school funds by the Arizona-New Mexico Enabling Act. On this fundamental matter of principle, the decision of the Arizona court conflicts squarely with the decision of this Court in *Ervien v. United States*, 251 U.S. 41, 40 Sup. Ct. 75, 64 L.Ed. 128 (1919). In *Ervien*, New Mexico had passed an act authorizing funds derived from the sale of public lands to be expended for advertising the resources and advantages of New Mexico. An action was brought under the identical Enabling Act here involved<sup>16</sup> to enjoin such expenditures on the grounds that the revenues from public lands could be used only for specific purposes and that it would be a breach of trust to use them for any other. The Court, in holding that the trust obligation was to be strictly construed, disposed of the matter briefly by approving of "the careful opinion of the Circuit Court of Appeals." This opinion, 246 Fed. 277 (8th Cir. 1917), reviewed the "advantage theory" which was adopted by the Supreme Court of Arizona in the instant case and rejected it, saying:

"It would be but a step further to argue the advantage that would accrue to the trust from the physical construction of some of the attractive resources of the state that are to be advertised, *such as systems of public highways, irrigation, public schools, and the like.*" Id. at 280-81. (Emphasis added.)

Arizona has now taken that further step; it is using not just revenues but the trust lands themselves on this "advantage" theory

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<sup>16</sup> Act of June 20, 1910, ch. 310, 36 Stat. 557.

for systems of public highways. This concept was positively rejected in *Ervien*.<sup>17</sup> The Court there held that:

"There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose; and to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should 'be deemed a breach of trust.'

"The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be, that the state might be tempted to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity." 251 U.S. at 47-48.

We are dealing with a trust in government lands and a grant for trust purposes. All such grants are strictly construed. *Caldwell v. United States*, 250 U.S. 14, 39 Sup. Ct. 397, 63 L.Ed. 816 (1919); *Slidell v. Grandjean*, 111 U.S. 412, 437, 4 Sup. Ct. 475, 28 L.Ed. 321 (1884); *Dubuque & Pac. R.R. v. Litchfield*, 64 U.S. (23 How.) 66, 16 L.Ed. 500 (1860). Hence, most other states dealing with analogous statutes have given them a very strict construction in favor of the clear requirement of payment. As has been noted, New Mexico, under the identical statute, has held that the State Highway Commission must compensate the school trust for rights-of-way and construction material; *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956). North Dakota, in *State Highway Comm'n v. State*, 70

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<sup>17</sup> Not only did the court below take this further step, it did so without referring to the *Ervien* case in its opinion, although the case was referred to both in the briefs (R. 28, 29) and was specifically made the basis of the motion for rehearing and reconsideration. (R. 43-46, 50, 51, 54).

N.D. 673, 297 N.W. 194 (1941), has held that the State Highway Commission cannot take school lands without compensation for rights-of-way. See also the direct holding in *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910), that school lands could not be condemned for dam and reservoir purposes.<sup>18</sup>

Nebraska, in *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951), and *State ex rel. Johnson v. Central Nebraska Pub. Power & Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841 (1943), has established the general principle that the legislature is not authorized to make a grant of public school lands without compensation for the taking, regardless of whether the grant is in fee, as an easement, or by lease. The

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<sup>18</sup> Sec. 10 of the Montana Enabling Act, 25 Stat. 676 (1889) also granted lands "for the support of common schools," and Art. XVII, Sec. 1 of the Montana Constitution placed the lands in trust, to be disposed of only for the purposes for which they had been granted. Accordingly the attempted condemnation of school lands in the case of *State ex rel. Galen v. District Court* also was held to violate the contract between the state and the federal government; a writ of prohibition was issued to prevent further condemnation proceedings as to them. Given these constructions of the more general provisions of their enabling acts by the Montana and Nebraska courts, the conclusion is inescapable that the far more restrictive and detailed corresponding provisions of the Arizona act should be given at the very least a similarly restrictive interpretation. See also *State v. Fitzpatrick*, 5 Idaho 499, 51 Pac. 112 (1897), and *United States v. Fenton*, 27 F. Supp. 816 (D. Idaho 1939), where a similar enabling act and constitutional provisions were interpreted to prevent any dissipation of school funds or violation of the conditions of the trust. The Idaho Admission Bill, 26 Stat. 215 (1890), and Idaho Const. Art IX, sec 3, were held in *Fitzpatrick* to prevent the legislature from enacting a statute permitting forfeitures or penalties to be paid from trust funds, since under those provisions the fund must be kept "inviolate and intact." In *Fenton*, following *Fitzpatrick*, the court held that a state statute of limitations was ineffective to limit the right of the state to assert its mortgage rights in a condemnation action brought by the United States. It carefully distinguished the ability of the state to handle revenues belonging to it from the restrictions surrounding control of the common school fund, citing *Board of Comm'r's v. State ex rel. Comm'r of Land Office*, 125 Okla. 287, 257 Pac. 778 (1926).

*Central Nebraska* case held that under the terms of the Nebraska Enabling Act, 13 Stat. 47 (1864), and of the Nebraska Constitution of 1866, Art. VII, sec. 1, the state was under a contractual as well as a constitutional obligation to refrain from disposition or alienation of school lands except as there provided. Sec. 7 of the Nebraska Enabling Act provided that specified sections would be set aside "for the support of common schools," and its constitution had confirmed this trust. Therefore the school fund was entitled to damages for the unauthorized taking of lands for an irrigation canal. In the *Board of Educational Lands and Funds* case, a statute authorizing lease renewals in certain circumstances was held to violate the provisions of the Nebraska Constitution relating to the school trust, since it did not result in the most advantageous return to the trust. Thus Nebraska has clearly recognized that the use of an interest representing less than the fee, as well as the fee itself, without full compensation to the school trust, is prohibited.

#### B. *The Legislative History Confirms the Interpretation of the Statute.*

The legislative history of the statute shows beyond question that Congress meant strictly to protect the land from all invasions. The history of Arizona's bid for statehood is a tortuous one.<sup>19</sup> As previously stated, only the provisions of the final statehood bill contained the requirement that the public lands themselves be placed in trust. This plan originated in the Senate and became

<sup>19</sup> Between 1889 and the final successful statehood bill, thirty-nine bills and twelve joint resolutions were introduced in Congress regarding statehood for Arizona. Twenty-nine of these bills and nine of the resolutions died in committee. Three bills were reported favorably out of the Committee on Territories and four bills and one resolution passed the House of Representatives but failed to come to a vote in the Senate. One bill passed both houses of Congress but died from want of agreement concerning amendments not involving land grants. Another bill was passed as an enabling act for Arizona, but was rejected by the people of Arizona because of its terms — that Arizona was to be admitted along with New Mexico as one state.

a substitute for an earlier House proposal. But the earlier legislative history materials show that Congress was consistently concerned with limiting the state legislative powers of disposal of school lands.<sup>20</sup>

The Act that proved to be eventually successful was originally introduced in the 61st Congress as H.R. 18166. This bill contained a provision that the proceeds of the lands be placed in trust, as was the case with the 1909 act. Even here, concern was expressed that the state receive an adequate return for its lands. See H. R. Rep. No. 152, 61st Cong., 2d Sess. (1910).

When the bill reached the Senate, the Committee on the Territories substituted a measure which placed the lands themselves in trust; for the acceptance of the substitute by the House on June 18, 1910, Sec. 45 Cong. Rec. 8487, Senate Rep. No. 454, 61st Cong., 2d Sess. at 18 (1910), noted that the Senate Bill:

"[E]xpressly declares that the lands granted and confirmed to the new states shall be held in trust, *to be disposed of only as therein provided and for the several objects specified*. The same trust feature is extended to the proceeds of the granted lands. Mortgages are entirely forbidden, and the sales and leases are required to be made to highest bidder at a public auction, after notice by advertisement, except that these formalities are dispensed with in a case of any lease for a period of five years or less." (Emphasis added.)

<sup>20</sup> See Hearings before the House Committee on Territories, 60th Cong., 2d Sess., p. 13 (1909), where problems of graft in connection with school land sales were recognized, and a committee member called for exact specification of what was to be done with the lands. In the legislative history of other unsuccessful bills, there are scattered references to the problems of legislative control and disposition of public lands. See, e.g., the debate on H.R. 12543, 57th Cong., 2d Sess., 36 Cong. Rec. 493 (1903) (remarks of Sen. Nelson); the debate on H.R. 14749, 58th Cong., 3d Sess., 39 Cong. Rec. 692-93 (1905); see H.R. 27891, Sec. 29, 60th Cong., 2d Sess. (1909), the text of which appears at 43 Cong. Rec. 2419 (1909), which provided for the proceeds of the permanent fund to be used only for the improvement, maintenance, and support of the respective educational institutions.

At page 20 of this report, the reason specifically given for placing the lands in trust was to prevent the recurrence of the circumstances leading to the "tall timber" cases in New Mexico.<sup>21</sup> The committee also referred to testimony from various representatives from Arizona at the time of the Senate hearings whose testimony was unanimous that the very careful restrictions that were placed about the disposition of the land were fully approved and supported by them.<sup>22</sup> And when the bill came to the floor of the Senate for discussion, the chairman of the Committee on the Territories again expressed concern that the lands be properly used, and stated that the amendment concerning disposition of the land was "the most important item in the Senate bill."<sup>23</sup>

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<sup>21</sup> See note 3, *supra*.

<sup>22</sup> At the time the House bill was considered in committee, a letter from former Secretary of Interior Garfield concerning the setting of minimum prices urged the necessity for curing the situation under which other states did not "derive the full benefit to which the schools are entitled." H.R. Rep. No. 152, 61st Cong., 2d Sess., p. 4 (1910). When an Arizona territorial delegate at the Senate Committee hearings was expressly interrogated as to whether he accepted on behalf of his state "the careful restrictions put about the disposition of lands" he outdid his questioner — "I believe the restrictions on such public lands cannot be made too broad." Hearings on S. 5916 before the Senate Committee on the Territories, 61st Cong., 2d Sess., p. 88 (1910).

<sup>23</sup> "The fourth difference, Mr. President, relates to disposal of the land which both bills appropriate for school purposes and other purposes. The House bill throws no safeguard whatever about the disposition of that land. I regard this as quite the most important item in the Senate bill.

"The Senate committee bill shows very carefully considered safeguards about its disposition. We took the position that the United States owned this land, and in creating these States we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes.

"So the Senate bill provides that there shall be no mortgages on the land; that it shall be sold and leased only after appraisement and advertisement; that the proceeds shall be kept in separate funds; and many other practical precautions which as a matter of mere business wisdom I think everybody agrees to. The Senate bill makes those lands and the proceeds thereof a trust fund.

The Senate Committee was fully aware of the seriousness of its actions. The conclusion of its report was:

"Your committee can not too earnestly call attention to the extreme care that should be taken with every provision of a bill like this. It is the only legislation which Congress can pass that never can be amended, repealed, or modified in any way. A statehood bill once enacted is enacted forever without possibility of change. If a mistake is made it is beyond remedy. Every other law Congress can enact can be repealed, amended, modified—but not a statehood bill. Therefore every line of it should be wrought out with a painstaking care not required of any other form of legislation. Once passed, corrections of mistakes are impossible; once passed, it is beyond recall." S. Rep. No. 454, at 33-34.

The act must now be interpreted in the light of the gravity and intent with which it was adopted. As the committee said: "Once passed, corrections of mistakes are impossible; once passed, it is beyond recall."

### *C. Subsequent Legislation Confirms This Interpretation of the Statute.*

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"Of course that is not without precedent. We have thrown conditions around land grants in several States heretofore, notably in the case of Oklahoma, but not so thorough and complete as this. The reason why it was thought necessary to do this, outside of the general reasons which would support it as a matter of good business prudence, was the unfortunate experience that occurred in the Territory of New Mexico a few years ago, where the land grant of time of 1898 was, as the Department of Justice thought, after careful investigation, grossly and fraudulently violated.

"The result was that a great deal of that valuable timber was sold at an absurd sum, and the Government, after careful investigation, began suits which are now pending against corporations and parties, and the Territory itself has been made a party.

"I might say this further thing, Mr. President, that it is to my mind important, that every person who appeared before the Senate committee, as is shown by the Senate hearings, regardless of his politics, without a single exception, approved, and in many cases very emphatically approved, of the restriction which was thrown around the lands in those Territories by the Senate bill." Remarks of Sen. Beveridge, 45 Cong. Rec. 8227 (1910).

An enabling act is very serious legislation, but it is legislation; if Congress has discovered that it has been too rigid in some particular, it can amend the Act, and if the state accepts the amendment there may be a new agreement.

The New Mexico-Arizona Enabling Act has been amended at least seven times in respect to the land restriction provisions.<sup>24</sup> Most of these are irrelevant for purposes of the instant case except as reminders that Congress retains the power to act; the most recent (1951) amendment, for example, relates to mineral leases and has nothing to do with public uses; see Act of June 2, 1951, ch. 120, 65 Stat. 51. They are also relevant as demonstrating that the Enabling Act covers less than fee interests. See Act of June 5, 1936, ch. 517, 49 Stat. 1477; Act of June 2, 1951, ch. 120, 65 Stat. 51. The committee reports accompanying these amendments emphasize that the changes in the provisions regarding leases were made to overcome the restrictions, necessarily recognizing that the act operates to prevent, without specific authorization, conveyances of less than fee interests in the trust lands as well as conveyances of the fee. See H. R. Rep. 1103, 74th Cong., 1st Sess. (1935); S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H. R. Rep. No. 429, 82d Cong., 1st Sess. (1951).

The most important of the amendments, directly relating to the present case, is the Act of Aug. 24, 1935, ch. 648, 49 Stat. 798, permitting the "State of Arizona" to "transfer without cost to the town of Benson title to" a given section for "park purposes." Benson was only a village, and Rep. Isabella Greenway explained to the House of Representatives that it could not possibly afford even the minimum \$3.00 per acre fee established by the Enabling Act. "Under the enabling act at that time," she told the House, "the State was authorized to transfer land at a

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<sup>24</sup>See Table, Appendix C, S. Rep. No. 194, 82d Cong., 1st Sess. p. 7 (1951); and Act of June 2, 1951, ch. 120, 65 Stat. 51.

cost of not less than \$3 per acre. The State of Arizona wants at this time to give this 640 desert acres to the little town of Benson, which could not possibly pay \$3 an acre for the purpose of park and recreation. The land is desert land, and it could not be used for any other purpose. The State wants to give it to the school (sic) for recreation and park purposes. The purpose of the bill is to enable them to do so without having to pay this \$3 per acre." 79 Cong. Rec. 12525 (1935).<sup>25</sup>

How can it be said that the State can not give a section for a park without an amendment to the Enabling Act, but that it can give, as it has, 40,000 acres for highways and material sites? We appreciate that the views of a subsequent Congress as to the meaning of an earlier law are not conclusive, *Waterman S. S. Corp. v. United States*, 381 U.S. 252, 269, 85 Sup.Ct. 1389, 14 L.Ed. 2d 370 (1965); *United States v. Price*, 361 U.S. 304, 313, 80 Sup.Ct. 326, 4 L.Ed.2d 334 (1960); but the subsequent interpretation may have weight, *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 79 Sup.Ct. 141, 3 L.Ed.2d 132 (1958), particularly when a group of statutes dealing with the same subject matter indicate a "harmonizing text," *United States v. Hutcheson*, 312 U.S. 219, 231, 61 Sup.Ct. 463, 85 L.Ed. 788 (1941).

We deal here with such a "harmonious text"—the entire statutory pattern of the land grants. A great, volume-laden predecessor of the New Mexico-Arizona statute was the North Dakota-South Dakota-Montana-Washington Act of Feb. 22, 1889, ch. 180, 25 Stat. 676. This act, which also contained grants for school lands and which provided (Sec. 11) that these lands could be

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<sup>25</sup>The Department of Interior, in approving the bill to give the section to Benson, quoted extensively from Sec. 28 of the Enabling Act and said, "The purpose of the proposed legislation is to remove the restriction contained in the enabling act. In view of the public purpose for which the land is desired, and the comparatively small area involved, I have no objection to offer to the passage of said joint resolution." H. R. Rep. No. 1103, 74th Cong., 1st Sess. pp 1-2 (1935).

disposed of only by public sale, was construed in *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910), as barring any acquisitions of school lands even by eminent domain —the lands could be put to public use *only* by an offering at public sale. As is developed more fully in the next section of this brief, the Montana opinion conflicted on this eminent domain question with an Idaho opinion interpreting its enabling act (Act of July 3, 1890, ch. 656, Sec. 5, 26 Stat. 215) the opposite way.

Faced with this problem, Congress adopted a general amendment to the Enabling Act for the four states, Act of Aug. 11, 1921, ch. 61, 42 Stat. 158, providing that those States "may, upon such terms as it may prescribe, grant such easements or rights in such lands as may be acquired in, to, or over the lands of private properties through proceedings in eminent domain."

The accompanying Committee reports show Congress scrupulously not taking a position on the *Galen* eminent domain issue, except to recognize the force of the decision. The Senate report quotes the relevant passage of the statute and says,

"A strict, and perhaps an accurate, interpretation of the language quoted would forbid that any part of such lands could be appropriated for the purpose of a public road or devoted to any other public use or acquired for any public purpose except at a competitive sale. It is to remedy this state of affairs that the bill in its initial part authorizes the States, respectively, to grant easements and rights in the lands granted, under conditions which, if they were owned privately, would make them subject to appropriation under the law of eminent domain." S. Rep. No. 93, 67th Cong., 1st Sess., at 1-2 (1921).

The measure, as handled on the House floor by Representative Burtress of Montana, was presented as one to make it possible for a state "to convey lands for public purposes such as highways." He explained that the purpose was to permit easements to be given

for roads; and he stressed that this would be "upon such terms as the State may prescribe." 61 Cong. Rec. 4491 (1921).<sup>26</sup>

If the Arizona Supreme Court's position is sound, then certainly Congress has been passing land laws needlessly. If a state has a right to grant easements for roads or otherwise dispose of lands for public purposes without charge, then not only Arizona's Benson Act but also the 1921 four-state legislation was entirely unnecessary. We submit instead that the consistent Congressional pattern coincides with the statute itself; Arizona can not dispose of the trust lands except as authorized by the statute. When the town of Benson was given 640 acres to use as a park, the enabling act had to be amended; when lands were to be sold at their appraised value rather than a minimum figure, when the legislature was permitted to provide for the exchange of lands held by the states for private lands, when it was authorized to permit agricultural and mineral leases, and to permit the extension of time for which leases could be made, special congressional provisions were made. Yet, under the present Arizona practice, 40,000 acres of trust lands have been given for highway and material site purposes in the past 10 years without any amendment to the statute and without any payment to the trust. Such a practice is both incongruent with the original Enabling Act and with the purpose of that Act as reflected by subsequent congressional understanding of it.

#### *IV. The Arizona Land Commissioner's Regulation is Valid.*

The regulation of the Arizona Land Commissioner, which he

<sup>26</sup>The 1921 Act was interpreted by a Senate Committee proposing a further (and irrelevant) amendment in 1932 thus:

"It was found necessary to modify the act so as to permit the granting of easements over the lands so granted for roads, telegraph, and telephone lines and easements generally such as may be acquired by the local eminent domain statutes. This was accomplished by the act approved August 11, 1921 (42 Stat. 158)." S. Rep. No. 139, 72d Cong., 1st Sess. (1932).

has been prohibited from enforcing by the decision of the court below, is as follows:

"State and County highway Rights of Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right of Way or Material Site has been made to the State Land Department. The appraised value of the Right of Way or Material Site shall be determined in accordance with the principles established in A.R.S. 12-1122." Proposed Regulation of State Land Commissioner, Rule 12.

This regulation imports the Arizona eminent domain standards for determination of the value of the right of way and material sites that are granted. A.R.S. Sec. 12-1122 is part of Arizona eminent domain procedure.

The attack on this regulation for the reasons of the court below is, we have argued to this point in this brief, baseless. The Arizona Supreme Court's decision that the land should be given out on a no-charge basis is violative of the trust obligations imposed by the Enabling Act.

There remains one further question—whether the trust lands may be taken under the eminent domain power without public sale. Nothing in the New Mexico-Arizona Enabling Act expressly authorizes taking of trust land even by eminent domain. If we take the view of the Montana court in *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910), then the trust lands can not be divested even by eminent domain procedures; road easements would have to be acquired by public sale, and Arizona and New Mexico would have to get some equivalent of the 1921 statute, discussed above, which the rationale of the *Galen* case made necessary for the four states to which it relates.

As we noted above, the Montana decision conflicted directly with an Idaho case of the same vintage, *Hollister v. State*, 9

Idaho 8, 71 Pac. 541 (1903). *Hollister* held that the eminent domain power was an inherent power of sovereignty, and that Congress could not have intended to create a sovereign and simultaneously deprive it of an essential of its sovereign being; hence it held trust lands subject to taking. Highly practical considerations point in the same direction; public sale of a borrow pit, of use only as it is close to a construction job, may well become a mockery, and while there will indeed be serious bidding for compact or contiguous lands, the public offer of an easement in a many-mile-long strip may draw poorly. Hence New Mexico, which has firmly held that the trust lands may be taken for road purposes only upon fair compensation, permits the use of eminent domain procedures and does not require public sale; *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317, 322 (1956), holds that it "could not have been within the contemplation of Congress" to require public sales for right of way easements or material dumps.<sup>27</sup>

We think it would strain a point to contend that when Congress enacted the 1910 New Mexico-Arizona Enabling Act it had the 1903 Idaho decision in mind, although that was the only outstanding decision on the exact point; the Montana case was determined a few months after the New Mexico-Arizona act. But we do rely in part on the uniform executive practice in the many states with trust lands; see the examples given in the Statement of Facts in this brief. Moreover, the Idaho decision is sound; the eminent domain power is an element of sovereignty, of which

<sup>27</sup>We are informed by the Commissioner of Public Lands of the State of New Mexico that "In those instances where the Highway Department in New Mexico wants to own the land without a reverter clause, such as some of its maintenance yards upon which it will construct permanent buildings, and also some roadside parks, it requests that the land be put up for sale and it bids it in as any private individual would do." Letter, General Counsel, New Mexico Commissioner of Public Lands, to Arizona Attorney General, July 5, 1966.

States do not divest themselves by contract. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 12 L.Ed. 535 (1848).<sup>28</sup>

The power of eminent domain is an inherent power of the state<sup>29</sup> that exists until it has been positively limited by a Constitutional provision or channeled by statute. Such provisions are not grants of power, but are only limitations on a power that would otherwise be absolute.<sup>30</sup> The power should not be deemed lost by implication.<sup>31</sup> By various statutes, the Arizona legislature has structured the power so as to permit the issuance of the Commissioner's Regulation now before the Court.

A.R.S. Sec. 37-441 provides that:

"The state may, when necessary for its uses or for the uses of any state department or institution, take over any state lands . . . and the department or institution so using the lands shall lease them and pay such rental as the state land department requires."

A.R.S. Sec. 37-461(A) provides that:

"The state land department may grant rights of way for any purpose it deems necessary . . . on and over state lands, subject to terms and conditions the department imposes. The depart-

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<sup>28</sup>For discussion see Frank, *Justice Daniel Dissenting*, 207-212 (Harv. Univ. Press, 1964).

<sup>29</sup>E.g., *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 Sup.Ct. 208, 82 L.Ed. 155 (1937); *Georgia v. Chattanooga*, 264 U.S. 472, 44 Sup.Ct. 369, 68 L.Ed. 796 (1924); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43 Sup.Ct. 442, 67 L.Ed. 809 (1923).

<sup>30</sup>*City of Cincinnati v. Louisville & N.R.R.Co.*, 223 U.S. 390, 32 Sup.Ct. 267, 56 L.Ed. 481 (1912); *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1876); *Garrison v. New York*, 88 U.S. 196, 22 L.Ed. 612 (1875). The only limiting constitutional provisions applicable here are U.S. Constitution Amendment XIV, and Arizona Constitution, Art. 13, Sec. 7, both of which require that just compensation be made for the taking of lands for public use.

<sup>31</sup>*The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837); *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 54 N.E. 689 (1899); *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903); *Terrace Hotel Co. v. State*, 46 Misc. 2d 174, 259 N.Y.S.2d 553 (1965).

ment may make rules and regulations respecting the granting and maintenance of such rights of way and sites.

And A.R.S. Sec. 37-481 provides that:

"The state land department shall conserve, sell or otherwise administer the timber products, stone, gravel and other products and property upon lands belonging to the state under rules and regulations not in conflict with the enabling act and constitution . . ."

These sections taken together provide authority for the state to exercise its power of eminent domain over state lands, and for the land department to promulgate regulations concerning the manner in which compensation is to be determined. Significantly, all three sections were originally enacted at the same time. Ariz. Laws, 1915, 2d Spec. Sess., ch. 5. They do not run afoul of the constitutional limitations on the eminent domain power because they provide a standard of just compensation (the department has promulgated a regulation incorporating the factors to be considered by a jury in computing compensation for private lands taken in formal eminent domain proceedings) and because there is an implicit requirement contained in A.R.S. Sec. 37-441 that the lands are necessarily taken. Under the above statutory pattern there has occurred the substantial equivalent of a formal eminent domain proceeding. Determinations of necessity of taking and of proper compensation have been made. The Commissioner has been obligated, under the statutes and his own regulation, to set the value of the right of way or material site taken at a reasonable price. Determinations of the necessity of the taking have been first made by the condemning agency and approved by the Governor. A.R.S. Sec. 37-442. The constitutional limitations on the power have thus been satisfied and the condemning agency is allowed to proceed.

We conclude that the trust lands are subject to eminent domain procedures, and that the Arizona regulation of the Land Commissioner is a valid application of those procedures.

*Conclusion*

Throughout the history of the development of the western United States, Congress has made continuing efforts to provide for the support of public education and other designated public purposes by the use of portions of the public lands and their proceeds. At the time the New Mexico-Arizona Enabling Act was adopted, Congress was particularly concerned that the trust lands themselves and their proceeds be held inviolate for these specifically enumerated purposes. The decisions of the other states having similar enabling act provisions show that respect has been given to this intent. But the policy of the Arizona Supreme Court, as established in its prior decisions, and reiterated most recently in the case now before this Court, disregards this clear congressional intent, with the result that future school children and other beneficiaries of the public lands trust may have the doubtful benefit of seeing the acreage intended to be preserved for them crisscrossed with highways and public utility lines without any compensation having been given to the trust for this taking. The effect of use for these purposes it to make the land itself utterly useless for any purpose other than public or utility transportation. Such a result, which would allow the taking without any contribution to the trust so carefully created, conflicts not only with the language of the Enabling Act itself, but with the most elementary concept of a fiduciary duty, and with the decisions of other states construing the New Mexico-Arizona and other similar enabling acts.

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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We conclude that the standards are subject to a general definition of "standard". And that the "standard" regulation of the Board of Commissioners is a valid regulation or mere guidance.

## APPENDIX A

## New Mexico-Arizona Enabling Act

Sec. 20. Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making of any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress.

Sec. 24. That in addition to sections sixteen and thirty-six heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: *Provided, however,* that the area of such indemnity selections on account of any fractional

township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such townships containing six hundred and forty acres or more: *And provided further*, that the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situated within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

Sec. 25. That in lieu of the grant of land for purposes of internal improvements made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp land grant made by the Act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress, made by the Act of July second, eight-

een hundred and three, which grants are hereby declared not to extend to the said State, the following grants are hereby made, to-wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said Territory shall until further order of Congress, continue to be paid to said State for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopa, Pima, Yavapai, and Coconino Counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two) one million acres: *Provided*, that if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues, or other profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said State, the income therefrom only to be used for the maintenance of the common schools of said State.

Sec. 26. That the schools, colleges, and universities provided for in this Act shall forever remain under the executive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Sec. 27. That five per centum of the proceeds of sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to the said State to be used as a permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within said State.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major

portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees



shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, that said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-

electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the con-

trary notwithstanding. It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

#### APPENDIX B Arizona Constitution

##### Article X

Section 1. All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;
2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or,
3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as

long thereafter as oil, gas or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, ~~or~~ appraisal; and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production.

\* \* \*

Section 8. Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this State by the said Enabling Act, not made in substantial conformity with the provisions thereof, shall be null and void.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 84

OBED M. LASSEN, COMMISSIONER, STATE LAND  
DEPARTMENT, PETITIONER

v.

ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of Arizona (R. 33) is reported at 99 Ariz. 161, 407 P. 2d 747.

JURISDICTION

The order of the Supreme Court of Arizona (R. 33, 43) was entered on November 12, 1965, and a petition for rehearing was denied on December 14, 1965 (R. 56). The petition for a writ of certiorari was filed on March 11, 1966, and granted on May 2, 1966 (R. 57, 384 U.S. 926). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

(1)

Cases—Continued      **STATUTE AND RULE INVOLVED**

Sidney v. Walker, 61 N.M. 374, 301 P.2d 317.  
Pertinent portions of Sections 24, 25, and 28 of  
the Act of June 20, 1910 (the Enabling Act of New  
Mexico and Arizona), 36 Stat. 557, 572-575, and  
Rule 12 of the Rules and Regulations Governing  
Rights of Way, promulgated on December 14, 1964,  
by the State Land Department of the State of Ari-  
zone, are printed in the Appendix, *infra*, pp. 23-27.

**QUESTIONS PRESENTED**

In the view of the United States, the questions presented are as follows:

Whether a State which, having received land from the United States in trust with directions to devote the land and its proceeds to school purposes, nevertheless takes an easement in the land for purposes of building a highway, may avoid any obligation to restore to the trust fund the amount by which the value of the trust property has been reduced in consequence of the taking by applying a conclusive presumption that the value of the trust lands is always enhanced by highway construction.

Whether, if not, it follows that in every case where an easement for highway construction on school lands is taken the State must pay into the fund an amount equal to the appraised value of the easement plus the net damage to the affected parcel resulting from the taking.

**INTEREST OF THE UNITED STATES**

In the enabling acts of a number of the western States, Congress granted large tracts of federal land to the new States in trust for specific public pur-

poses, chiefly educational. The present case involves a recurrent issue in the interpretation of these federal trusts: whether, when the State authorities decide to devote a portion of the trust lands to a use not expressly permitted in the trust—specifically, highway construction—they must pay into the trust fund the monetary equivalent of the loss sustained by the trust corpus. Since the Arizona Enabling Act vests in the Attorney General of the United States, concurrently with the responsible State officials, authority to enforce the federal trust (see Statement, *infra*, p. 4), and since the issue in this case is an important one in the administration of the trust,<sup>1</sup> we deem it appropriate to set forth the views of the United States.

#### **STATEMENT**

In the Act of June 20, 1910, 36 Stat. 557—an Act to enable the people of New Mexico and Arizona to establish State governments and be admitted to the Union on an equal footing with the original States—Congress made extensive grants to the new States of federal lands located within their borders to be used for specific purposes. More than 8 million acres were granted to Arizona for the support of its schools, and substantial additional land for the support of a university and other public institutions.<sup>2</sup> See Sections 24 and 25 of the Act, 36 Stat. 572-573; *Public Land Statistics 1964* (U.S. Dept. of Interior, Bur. of Land

<sup>1</sup> Its importance is suggested by the fact that nine western States have appeared in this Court as *amici curiae* urging reversal.

<sup>2</sup> For simplicity, we shall refer to all of the lands granted in trust for specific purposes as "school lands."

Management), p. 8.<sup>197</sup> Under the Act, the State holds these lands only "in trust," and the terms of the trust are detailed and explicit. See Section 28, 36 Stat. 574-575.

Thus, it is provided that the lands may "be disposed of in whole or in part only in manner as herein provided and for the several objects specified [e.g., school support] \* \* \* and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." "Disposition of any of said lands," or of the proceeds thereof, for any other object is declared to be a breach of trust. The trust lands, moreover, are not to be sold or leased except to the highest bidder at a public auction conducted in accordance with rules specified in the Act, and a permanent segregated fund is to be established by the State treasurer to keep all proceeds and rents derived from the lands. This fund is to be invested in safe interest-bearing securities. Only the interest is available for support of the schools. The principal cannot be invaded.

The Act further provides that "[e]very sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void." The Attorney General of the United States is given "the duty \* \* \* to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce" the limitations provided in the Act upon the

use and disposition of the lands and their proceeds. However, it is also provided that "[n]othing herein contained shall be taken as a limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

The State Land Commissioner of Arizona, petitioner in this Court, is the State official responsible for the control and disposition of the public lands of the State, including the school lands granted by the federal government in the Enabling Act. See Ariz. Rev. Stat., §§ 37-102, 37-104, 37-131; *State ex rel. Conway v. Versluis*, 58 Ariz. 368, 120 P. 2d 410; n. 8, *infra*, p. 11. On December 14, 1964, his department adopted a rule (Rule 12 of the State Land Department's Rules and Regulations Governing Rights-of-Way) to the effect that State and county highway rights-of-way and material sites<sup>\*</sup> will be granted only "after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department." (R. 11-12, 18-19.)<sup>†</sup> The new Rule also provided (R. 19) that "appraised value" was to be determined in accordance with the principles of Section 12-1122 of the Revised Statutes of Arizona. This is a general provision governing compensation in eminent domain proceedings. It has been interpreted to entitle the owner of condemned property to the highest open

\* A "material site" is one from which soil, rocks, etc., are extracted for use in highway construction. (TS-82)

† Theretofore, the practice (which previous Land Commissioners had unsuccessfully challenged) had been for the Land Department to allow public (including school) lands to be used by the State for highway purposes without requiring any form of compensation (R. 20). Inv no 5152, v. 18, page 202, sheet no 108 by P. H. GSA.

6

market value of his property. See *Viliborghi v. Prescott School District No. 1*, 55 Ariz. 230, 100 P. 2d 178; *Town of Williams v. Perrin*, 70 Ariz. 157, 217 P. 2d 918.

On the same day that the new Rule was adopted, the State of Arizona, on the relation of the Arizona Highway Department, filed a petition for a writ of prohibition in the Supreme Court of the State (R. 1). The court directed the State Land Commissioner to show cause why he should not be permanently restrained from any further action to promulgate or enforce the Rule (R. 25-26). Both sides filed memoranda of points and authorities (R. 3, 18, 26), but no affidavits or evidentiary materials other than a copy of the Land Department's right-of-way rules were submitted (R. 5). The Highway Department made clear that it was challenging only the basic principle embodied in the Rule—that the "State Land Commissioner has jurisdiction to exact compensation from the petitioner for rights of way and material sites granted to it from the 'Trust' lands granted to the state by virtue of the Enabling Act" (R. 26). No question as to the propriety of the appraisal method prescribed by the Rule was raised. The Highway Department contended that "the court's approval or disapproval of any particular method of exacting the compensation or in determining its amount would be outside the issues as presented in this cause." (R. 26-27.)

<sup>4</sup> Section 12-1122 also provides that where only a portion of a parcel is condemned, the owner shall be entitled to any damages caused the remaining portions less any benefit conferred on them. See, generally, *State ex rel. La Prade v. Carrow*, 67 Ariz. 429, 114 P. 2d 891.

On November 12, 1965, the Arizona Supreme Court issued its opinion (R. 33). Reaffirming its earlier decision in *State v. State Land Department*, 62 Ariz. 248, 156 P. 2d 901, it held "that it is the duty of the Land Commissioner to grant, without compensation, material sites on, and easements for rights of way over state lands held in trust by virtue of the Enabling Act of Arizona," and ordered "that the writ of prohibition be made permanent" (R. 43). The court reasoned that a State highway system enhances the value of land in the State generally; that the value of the trust lands, comprising as they do substantial tracts located throughout the State, would therefore be enhanced rather than depreciated by highway construction upon them; and, hence, that the trust would not be impaired though no compensation was paid (R. 40-41).

#### **ARGUMENT**

##### *Introduction and Summary*

From the earliest days of our nationhood, in contemplation of the admission of a new State to the union the federal government has made extensive grants of land from the federal domain in the State in trust for the support of the State's schools.\* The practice had its antecedents in the colonial era. Its philosophy was stated in the Northwest Ordinance of 1787, in which the Continental Congress set aside por-

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\* The history of this practice is traced in Orfield, *Federal Land Grants to the States* (1915), pp. 36-52; Hibbard, *A History of the Public Land Policies* (1924), pp. 305-318; Donaldson, *The Public Domain* (1884), pp. 223-226.

tions of the Northwest Territory for school purposes—a precursor of the later grants. "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 12 *Journals of Congress* 61. Over the years, almost 80 million acres have been granted by the federal government to the States for the support of their common schools. *Public Land Statistics 1964* (U.S. Dept. of Interior, Bur. of Land Management), p. 9.

The early grants were general in terms. They provided that the State was to hold the land in trust for the purposes specified in the grant, but they did not delineate with particularity the duties of the trustee, especially with regard to the sale of land covered by the grant and the disposition of the proceeds. Under these grants, improvident dealings in school lands were widespread. To avert dissipation of trust assets for the future, Congress progressively tightened the terms of the trust in later grants, notably the Enabling Act of New Mexico and Arizona.<sup>1</sup> That Act contains elaborate safeguards with respect to the sale and lease of the trust lands and the disposition of the proceeds and rents designed to prevent impairment of the trust (see Statement, *supra*, p. 4), and any attempt to use such proceeds other than as prescribed in the Act may be enjoined. *Ervien v. United States*, 251 U.S. 41.

<sup>1</sup> See *Murphy v. State*, 65 Ariz. 338, 181 P. 2d 336; S. Rep. No. 454, 61st Cong., 2d Sess., pp. 19-20; Orfield, *supra*, n. 6, pp. 48-52; Hibbard, *supra* n. 6, pp. 317-318.

Concerned as they were with problems arising from the disposal of school lands by sale or lease, the framers of the Act neglected to focus on the distinct question of the consequences of a State itself using the lands for objects other than those specified in the Act—for example, building highways. Such a use would appear to be at least a technical breach of trust. But since the State is free to sell trust lands (so long as it complies with the conditions in the Act relating to the method of sale and use of the proceeds), most courts that have considered the question have concluded that the State may, instead, use them itself for a non-school purpose. The more difficult question—on which the Act is silent—is what provision the State must make for compensating the trust for such a taking. The Supreme Court of Arizona has held the State need make none, at least when the taking is for highway construction. The highest court of New Mexico disagrees (*State v. Walker*, 61 N.M. 374, 301 P. 2d 317), as do the *amici*.

In view of Congress' overriding purpose to preserve unimpaired the value of the trust established by the Enabling Act, we reject the proposition that a State is free to divert school lands to other public purposes without reimbursing the trust fund to the full extent of any impairment. The Supreme Court of Arizona reasoned that highway construction always enhances the value of the trust lands more than it reduces the value of the directly affected parcel and hence that compensation is never due. But, surely, the court's premise is not universally valid. Conceivably, some highway construction may depress the value of the

affected tract without producing an equal or greater enhancement of the value of the remaining school lands. The State cannot, in our view, presume enhancement. The matter must be put to proof. Otherwise, the risk of impairment of the trust corpus is great.

It does not follow, however, that the State Supreme Court was required to approve the rule adopted by the State Land Commissioner, which requires the State in every case where it takes a highway right-of-way or material site to pay compensation in accordance with eminent-domain principles of valuation and compensation codified in Section 12-1122 of the Arizona Revised Statutes. In many cases, highway construction on school lands probably does enhance the total value of the trust lands more than it diminishes the value of the directly affected parcel. An offset of this kind apparently would not be recognized under normal condemnation principles. Here, however, different considerations come into play. We do not believe the State should be compelled to pay compensation beyond what is realistically necessary to protect the integrity of the trust.

The parties have not addressed themselves to these problems of compensation. The Highway Department, indeed, indicated early in this proceeding that such problems were not within the scope of its challenge to the State Land Commissioner's rule. The court below, moreover, apparently viewed the case as presenting only the issue whether the State Land Commissioner may ever demand compensation for a highway taking of school lands. We urge this Court, therefore, to reverse the judgment below and

remand the case to the Supreme Court of Arizona with instructions to vacate the writ of prohibition insofar as it precludes the State Land Commissioner, in all cases, from requiring compensation as a condition to granting a highway right-of-way or material site, making clear that the court below is not bound to apply the particular method of determining compensation prescribed in the Commissioner's rule.\*

**L. THE PURPOSES OF THE ENABLING ACT FORBID THE TAKING OF SCHOOL LANDS FOR HIGHWAY CONSTRUCTION WITHOUT COMPENSATION TO THE TRUST FUND FOR ANY IMPAIRMENT OF THE VALUE OF THE TRUST CAUSED BY THE TAKING**

A. The issue in this case may be brought into sharp focus by a comparison with that in *Ervien v. United States*, 251 U.S. 41—the only other case concerning the trust provisions of the Enabling Act of New Mexico and Arizona to have come before this Court. In *Ervien*, the State of New Mexico authorized its Com-

\* A word on the justiciability of this case may be in order, in view of the fact that both parties are agencies of the State of Arizona. The State Land Commissioner appears to be a substantially independent officer. He is appointed for a period of years (six) and he can be removed only for cause. He evidently has ultimate responsibility for control of the public lands of the State. Ariz. Rev. Stat., § 37-131; see, also, §§ 37-102, 37-104. In effect, he is the trustee of the trust created by the Enabling Act, and a trustee should always be able to obtain instructions as to his duties under the trust from a court. In addition, since the Commissioner has custody of all public lands, the Highway Department cannot obtain highway rights-of-way on school lands without a grant from the Land Commissioner—which the latter refuses to make except under the conditions prescribed in his rule. Therefore, the basic elements of a justiciable case seem present.

missioner of Public Lands to expend three cents of every dollar collected by him from sales and leases of State lands (including school lands granted to the State in trust by the Enabling Act) to publicize the resources and advantages of the State, especially to home-seekers and investors. This Court, in a brief opinion, held that the expenditure was forbidden by the Act. The breach of trust was indeed patent. The Act expressly provides that the proceeds of any sales, and the income from any leases, are to be kept in a permanent, segregated fund, and the fund invested in safe interest-bearing securities. Only the interest may be spent at all—and then, of course, only for the support of the specific objects of the trust. To allow a portion of the fund to be spent for advertising would, thus, be directly contrary to Congress' fundamental purpose—preserving the trust fund intact. See, also, *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 159 Neb. 79, 65 N.W. 2d 392; *State v. Fitzgerald*, 5 Idaho 499, 51 Pac. 112; *Murphy v. State*, 65 Ariz. 338, 181 P. 2d 336.

The present case is different in that while the Act makes detailed provision for the disposal of school lands to private persons and for the handling of the proceeds, it does not advert to the propriety or the consequences of the State's using the lands for purposes other than those specified in the grant. We must thus consider, first, whether such a use is consonant with the statute and, second, if so, whether the trust must be compensated for the taking.

1. The argument that a State may not use its school lands for any purpose other than support of its schools

Court, therefore, to reverse the judgment below and

has some support in the language of the Enabling Act, but it has generally—and we think rightly—been rejected. *Ross v. Trustees of Univ. of Wyoming*, 30 Wyo. 433, 222 Pac. 3, 31 Wyo. 464, 228 Pac. 642 (on rehearing); *State v. Walker*, 61 N. M. 374, 301 P. 2d 317; *Grosseta v. Choate*, 51 Ariz. 248, 75 P. 2d 1031. *Contra: State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706. If, as the Act expressly provides, the State is free to sell school lands to private persons, subject only to the conditions that the sale be conducted in the manner prescribed in the Act and that the proceeds be placed in the school fund, it seems wholly artificial to preclude the State from using, instead of selling, the land for non-school purposes. The permission to sell clearly indicates that Congress had no intention of requiring the States to use the particular lands granted to it as actual building sites for schools. It would be preposterous to suppose that Congress believed common schools would occupy 8 million acres of the State of Arizona. The congressional purpose was to provide the States with a fund—initially in the form of land, but with the expectation that much of it would eventually be converted to cash—for the support of education.\* So long as the

\* This is also indicated by the fact that whereas in the early grants only one section per township was set aside for school support, four sections per township were granted for this purpose to New Mexico and Arizona because most of the unappropriated lands in those States were arid and of little value. Orfield, *supra* n. 6, p. 45. Also, in keying the grant to sections and townships, Congress was rigidly following the checkerboard pattern of the master survey of the federal domain—a pattern that is strictly geometrical and without conscious regard for the particular topography, let alone the school needs.

**fund is not depleted, it should not matter whether the land is conveyed to a private purchaser or to a State agency.**

The argument in favor of permitting the State to use, rather than sell, school lands for non-school purposes is especially forceful when the contemplated use is public highway construction. Suppose the State decides to build a highway between two cities and the natural route for the highway would cross a tract of school land. Must the State detour the road around the tract? In many cases, that would be a wasteful and pointless procedure. Must the State first auction the affected land to a private purchaser in the manner provided in the Enabling Act and then condemn the property? That would be impractical as well as redundant. There is not likely to be a market for public highway rights-of-way, the interest being auctioned.

To deter highway building by insisting on the letter of the Act would also be unfortunate in that, in many instances, a public highway built on Arizona school lands is probably a real improvement which enhances their value. We may assume that many of the tracts are in remote and relatively inaccessible areas of the State, and that highway construction across them will increase their marketability, and ultimately, therefore, enrich the trust fund. It would ill accord with the purposes of Congress in establishing of each State. (For a description of the survey, see Memorandum for the United States as *Amicus Curiae*, *Placid Oil Co. v. Union Producing Co.*, pending on petition for certiorari, No. 88, O. T., 1968.)

lishing the trust to thwart so potentially beneficial a use of the lands.

In light of these considerations, we submit that the provision in the Enabling Act that precludes disposition of school lands other than as provided in the Act should not be read literally. Cf. 4 Scott, *Trusts* (2d ed., 1956), § 381; 2 *id.*, § 167. This result is consistent with the legislative history. Congress was concerned with the problems arising from the sale or lease of school lands. It desired to ensure the integrity of the trust by closely regulating the commercial exploitation of the lands. It never focused upon the distinct question involved in the use of school lands by a State agency for highway purposes.

2. So far, the parties are on common ground; none suggests that it is improper for the State of Arizona to use its school lands for highway purposes. It appears also to be common ground that to the extent such use may diminish the value of the trust, the trust fund must be compensated for the loss. Certainly, in view of Congress' manifest concern with preserving the trust's integrity, it would be untenable to maintain that a State is free to divert school lands to purposes not specified in the Act, without paying such compensation to the fund as may be necessary to make the trust whole. Moreover, that result could not be reconciled with the provision of the Act that "[e]very \*\*\* conveyance \*\*\* of or concerning any of the lands hereby granted or confirmed, or the use thereof \*\*\* is not made in substantial conformity

the State would bear to a private individual if it were

with the provisions of this Act shall be null and void."<sup>10</sup> If there is to be "substantial conformity," the trust may not be impaired as a result of the use of the lands for a purpose not specified in the Act.

B. The contested issue here is thus a narrow one. It is whether it may be conclusively presumed that the use of Arizona school lands for highway rights-of-way and material sites invariably results in a net enhancement of the value of the school lands as a whole. That is the holding of the Supreme Court of Arizona in this case. We urge this Court to reject it. There may well be instances where highway construction on school lands is on balance beneficial to the lands, but one can readily conceive of instances where this is not so. Suppose a tract of school land is located in an area suitable for residential development, and the State decides to put a superhighway through the middle of it, destroying its considerable potential for such development. The damage to the trust is appreciable; it is unlikely to be completely offset by any increment in value contributed to the school lands in general by the construction of an additional major highway in the State.

In such a case, to fail to contribute to the trust fund an amount equal to the impairment caused by the taking would run squarely counter to the purposes

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<sup>10</sup> There is some suggestion in the opinion of the Supreme Court of Arizona that the Act is concerned only with the taking of a fee interest in school lands, not an easement (R. 39). The quoted language from the Act refutes this point. The grant of an easement, whether for a highway right-of-way or material site, is plainly a conveyance of or concerning the affected land or its use.

of Congress. And because such cases may occur, the State may not, in our view, place the issue whether compensation is necessary beyond proof, as it has attempted to do in adopting an artificial—and irrebuttable—presumption that such compensation is never necessary. However, as next we urge, it does not follow that the State in school-land takings is liable to the trust fund to the precise extent as in ordinary condemnation proceedings—the standard proposed by the State Land Commissioner in the rule that triggered this litigation.

II. IN EVALUATING, FOR PURPOSES OF ASSESSING THE COMPENSATION DUE THE TRUST FUND, THE IMPAIRMENT OF THE TRUST CAUSED BY THE TAKING, THE STATE IS NOT NECESSARILY BOUND TO APPLY PRECISELY THE SAME PRINCIPLES THAT WOULD BE APPLIED IN ORDINARY CONDEMNATION PROCEEDINGS

The court below, holding that compensation to the trust fund need never be paid by the State Highway Department, did not reach the question under what standards such compensation should be computed (though it did, in passing, register criticism of the Land Commissioner's proposal to base compensation on a parcel-by-parcel valuation, without consideration of the impact of the highway construction on the value of the trust lands as a whole (R. 40)). Accordingly, there is no occasion for this Court to reach the question. We do, however, suggest that the Court need not endorse the rigid compensation formula prescribed in the Commissioner's rule, which equates the obligation of the State to the trust fund to that the State would bear to a private individual if it con-

denied a highway right-of-way (see Statement, *supra*, pp. 5-6).

So saying, we recognize the force of the argument in support of such a principle of compensation. Treating the State's use of school lands for highway purposes as the appropriation of an easement for which compensation is due in accordance with the usual principles applicable in eminent-domain proceedings has the considerable advantage of easy administration. Too, it could be argued that such a rule is likely to most nearly approximate the results of a public auction—the method prescribed by the Enabling Act for the sale of school lands. It is, perhaps, the rule most likely to provide an ironclad guarantee of the integrity of the trust corpus. But it has a serious drawback.

It appears that, under the law of Arizona, an owner is entitled to the fair market value of the easement or other interest condemned, even if the value of the underlying fee is increased by the taking.<sup>11</sup> As applied to the unique landholding represented by the 8 million acres of school lands in Arizona, this principle could occasionally produce highly unrealistic results.

<sup>11</sup> Such enhancement may be offset only against any additional damages—beyond the fair value of the condemned interest—that the fee may have sustained as a result of the taking. Ariz. Rev. Stat., § 12-1122; Statement, *supra*, p. 6, n. 5. Other jurisdictions may permit enhancement to be set off against fair value as well. See, generally, Dodge, *Land Acquisition for State Highways*, 1953 Wis. L. Rev. 458; Crouch, *Valuation Problems Under Eminent Domain*, 1959 Wis. L. Rev. 608. But none to our knowledge would permit evidence of any enhancement beyond that of the immediately affected parcel to be considered.

For, as noted earlier (p. 16, *supra*), there are undoubtedly cases where highway construction is likely to enhance the market value of the school lands of the State as a whole far more than it diminishes the market value of the particular parcel in which the easement is taken. In a case where that is so, the taking would not impair the trust, and a contribution to the trust fund would therefore not be required to fulfill the congressional objective of preserving the value of the trust intact.

We see no objection in principle to the State's taking this factor into account. To forbid it to do so, indeed, might deter highway construction which was clearly advantageous to the school lands, by precluding the State Land Commissioner from inviting the State Highway Department to utilize school lands for such a purpose without demanding an eminent-domain award. While, as noted, the consideration we suggest represents a departure from standard eminent-domain principles, the school lands—considering their extent and wide dispersal throughout the State—cannot be likened to conventional private property interests. The law of eminent domain was not developed with this unique situation in mind.

We emphasize, however, that the burden of proof is upon the State Highway Department to establish, with reasonable definiteness, the enhancement of the value of the school lands allegedly created by a particular taking. Enhancement cannot be presumed. The presumption, rather—which it is for the highway authorities to rebut, if they can, on a factual case-by-case basis—is that a diversion of school land to a

non-school use has impaired the trust to the extent of the fair value of the easement plus any incidental damages.

Thus, we urge merely that in devising an appropriate measure of compensation to the trust for highway takings, it may be appropriate—in view of the silence of the statute on the point—to allow the State a flexibility and latitude commensurate with the equitable character of a trustee's powers and duties. See, generally, 2 Scott, *Trusts* (2d ed., 1956), § 164. We do not consider this result foreclosed by *Ervien v. United States*, 251 U.S. 41 (pp. 11–12, *supra*). The State in that case argued that the expenditure of a portion of the trust fund for advertising the attractions of the State should be permitted because it would enhance the value of the school lands. This Court rejected the argument, and properly so. Any expenditure of trust monies for non-school purposes was expressly forbidden by the Enabling Act. The legislative intent to preserve the fund intact was unmistakable. There was accordingly no occasion to consider the wisdom of the expenditure in relation to the overall purposes of the trust. Cf. *Ashburner v. California*, 103 U.S. 575. Since, in the present situation, the language of the Act provides no sure measure of the State's obligations,<sup>12</sup> the State is perforce required to look to those general purposes for guidance. And since the thrust of the Act is to allow the State considerable flexibility in the use of particular trust lands so long as the value of the trust corpus is not

<sup>12</sup> As noted earlier (p. 14), the provisions relating to the sale of trust lands are inapposite to a highway taking.

impaired, we conclude that the State may properly adopt a principle of compensation that considers the impact of the taking upon the value of the trust as a whole rather than focuses narrowly upon the value of the interest condemned.

**CONCLUSION**

The judgment below should be reversed and the case remanded.

Respectfully submitted.

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**ROBERT H. MAYNARD,**  
*Attorney.*

AUGUST 1966.

wherefore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylum for the deaf, dumb, and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the

<sup>5</sup>  
The Act was amended, in respects not material here, by the Act of June 6, 1908, c. 617, 35 Stat. 1477, and the Act of June 2, 1931, c. 139, 48 Stat. 51.

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## **APPENDIX**

**The Act of June 20, 1910, c. 310, 36 Stat. 557, et seq.**, provides in pertinent part:

**SEC. 24. [36 Stat. 572.]** That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools.

**SEC. 25. [36 Stat. 573.]** \* \* \* [T]he following grants are hereby made, to wit:

For university purposes, two hundred thousand acres; for legislative, executive, and judicial public buildings heretofore erected in said Territory or to be hereafter erected in the proposed State, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for insane asylums, one hundred thousand acres; for school and asylums for the deaf, dumb, and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal, and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the

**bh** The Act was amended, in respects not material here, by the Act of June 5, 1936, c. 517, 49 Stat. 1477, and the Act of June 2, 1951, c. 120, 65 Stat. 51.

agricultural and mechanical college to said Territory shall, until further notice of Congress, continue to be paid to said State for the use of said institution: for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Maricopia, Pima, Yavapai, and Coconino counties, Arizona, which said bonds were validated, approved, and confirmed by the Act of Congress of June sixth, eighteen hundred and ninety-six (Twenty-ninth Statutes, page two hundred and sixty-two), one million acres.

**SEC. 28.** [36 Stat. 574-575.] That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

Not mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at

a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capitol, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price herein-after fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the

particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

**Rule 12 of the Rules and Regulations of the State Land Department of Arizona Governing Rights of Way, December 14, 1964, provides:**

**RIGHTS-OF-WAY FOR STATE AND COUNTY HIGHWAY AND MATERIAL SITES.** State and

County Highway rights-of-way and material sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in ARS-12-1122.

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IN THE SUPREME COURT OF THE UNITED STATES, CLERK

October Term, 1966

No. 84

OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

BRIEF OF RESPONDENT

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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

## No. 84

OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

### BRIEF OF RESPONDENT

#### PRELIMINARY STATEMENT

The decision under review arose as an original Writ of Prohibition in the Arizona Supreme Court to test the validity of Rule 12 of the State Land Department, which purported to require specific payment to be made for all rights of way and material sites used by the State of Arizona and its various Counties for highway construction purposes.<sup>1</sup>

Since there was no trial, and since no evidence relative to Rule 12 was adduced at the hearing held in connection with the promulgation of that Rule, there is no record in this case except for a few formal legal documents. The relevant facts are therefore limited to those which appear on the face of the motions and other papers which have been filed, and those of which the Court may take judicial notice. The nature and

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<sup>1</sup>Rule 12 is set forth at pages 11-12 of the Transcript of Record.

extent of those facts will be discussed in the body of the argument.

#### STATUTE INVOLVED

It is the Respondent's view that the following provisions of Section 28 of the Arizona Enabling Act lie at the heart of the issues in this case:

"Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered.

"All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . .

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void. . . ."

#### QUESTIONS PRESENTED

1. Whether this Court should reject a finding of fact by the Arizona Supreme Court where there is no evidence on the record inconsistent with such finding.
2. Whether the Arizona Supreme Court, in interpreting and implementing the provision of the Arizona Enabling Act that trust lands not be disposed of except for value, should be allowed to consider value return from the standpoint of all

trust lands and not just isolated parcels or sections.

#### SUMMARY OF ARGUMENT

The Arizona Enabling Act prohibits the disposal of certain lands held in trust "for a consideration less than [their] value . . .".

For more than 50 years, the Arizona State Highway Department has been using State lands for the construction of highways without paying specific dollar compensation for each parcel taken. From 1938 down to the present, the Arizona Supreme Court has, on three separate occasions, held that this practice does not violate the value requirements of the Arizona Enabling Act. These decisions have all been based upon the Court's determination that as a matter of fact the construction of highways across trust lands in the State of Arizona does not diminish the value of those lands. There is no evidence on this record that that factual holding is incorrect.

If the Petitioner is to succeed in upsetting the lower Court's holding, he must either:

1. Overturn the Court's holding that, in fact, the construction of highways across sections of trust lands in Arizona does not decrease the value of those lands as a whole.
2. Show that the Arizona Court was wrong in holding that the value requirements of Arizona's Enabling Act permit a determination of the value return to all trust lands considered as a whole, and not just the particular parcels used for highway purposes.

The first of these alternatives might have been accomplished at one stage of the litigation, but certainly not before this Court. A proceeding before the United States Supreme Court is two stages too late to start introducing evidence.

As to the second issue, the Arizona Enabling Act creates in the State broad leeway in interpreting and administering the trust land provisions of the Act. There is also implicit in the holdings of this Court the doctrine that an interpretation placed

upon an enabling act by the state involved will be upheld unless unreasonable. Such a doctrine is particularly appropriate where the relevant provision deals with matters which substantively are within the scope of exclusive state responsibility, such as schools, hospitals, reformatories, etc.

The United States agrees that value enhancement to trust lands directly attributable to highway construction must be offset against the value of land taken for highway purposes. The United States would apparently permit the offset, however, only on a section by section or project by project basis. Such a restriction is repugnant to the principle—with which the United States agrees—that it is the net effect of a public use on the value of the trust which must be considered. It is no more tenable to limit the consideration of value return to the trust to particular projects or to arbitrary section lines, as the United States seems to suggest, than to adopt the Petitioner's contention that only the lands actually used for highway purposes should be considered.

The Arizona Supreme Court's interpretation in this case is supported by the holdings of other courts and by the position taken over the years by the United States Department of Justice—the federal agency charged with the enforcement of this federal statute. It is also supported by studies which have been conducted in other states as to the effect of highways upon the values of nearby lands, and by the role which historians have assigned to highways in developing the State of Arizona and enhancing the value of its lands.

## ARGUMENT

### I. *The Holding of the Lower Court Rests Upon a Factual Foundation Which May Not be Rejected by Fiat, as the Petitioner Attempts to Do.*

Notwithstanding any implications in the Petitioner's Brief, neither the Arizona Supreme Court nor any of the agencies of

this State has ever suggested that trust lands could be given away, or disposed of in any way so that the trust fund is diminished. The issue in this case is not whether the State of Arizona may ignore the requirements of its Enabling Act dealing with trust lands. This the Arizona Supreme Court has never done nor purported to do; on numerous occasions it has reaffirmed its recognition that all State law and policy must conform to those requirements. See e.g. *Murphy v. State*, 65 Ariz 338, 181 P.2d 336 (1947); *Boice v. Campbell*, 30 Ariz. 424, 248 Pac. 34 (1926).<sup>2</sup>

The issue is, rather, whether the State of Arizona—in carrying out its statutory responsibility of enforcing the trust land provisions of its own Enabling Act—may, within reasonably circumscribed bounds, interpret and implement such terms as "no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

There are various means by which parcels of these trust lands could be used or disposed of so as to preserve or enhance the "value" of the fund represented by the lands and their proceeds. One such means would be to charge specific prices for every piece of land sold, leased, or encumbered, no matter how small and regardless of the effect which utilization of the parcel taken might have on the value of remaining lands. But this is not by any means the only method—nor is it necessarily the most effective—by which that end may be accomplished.<sup>3</sup>

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<sup>2</sup>The sole relevance of the amendment of the Enabling Act to permit 640 acres to be given to the town of Benson is that this amendment bears out Arizona's vigilance in enforcing both the letter and the spirit of its Enabling Act, and requiring cash payment where cash payment is required by the Act. The disposition of an entire section would obviously result in a value decrement to the trust since there would be no remaining surrounding trust lands, and other trust lands throughout the State would hardly benefit from the construction of a park in Benson.

<sup>3</sup>Consider, for example, the possible situation in which the United States is considering the construction of a new atomic energy facility

Since the issue was first raised in *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Courts of the State of Arizona have taken the broad view as to the meaning of the value requirement of the Arizona Enabling Act. Under that view, utilization of trust lands for public use is permissible if the increase in value to the remaining trust lands resulting directly from such public use is equal to or greater than the actual value of the land taken. This was the holding of *Grossetta v. Choate*, *supra*, and *State of Arizona ex rel Conway v. State Land Department*, 62 Ariz. 248, 156 P.2d 901 (1945).

*Grossetta v. Choate* and *State v. State Land Department* also held that in fact the grant of rights of way and material sites over trust lands results in an overall value increase to such lands, notwithstanding the unavailability to the trust of that portion of the land over which the highways were constructed. The value increment to remaining lands more than offsetting the value of lands taken, the value requirements of the Enabling Act were held satisfied.<sup>4</sup>

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and needs forty acres for that purpose. One of the possible sites is located near the center of one of the sections reserved by the Enabling Act for the support of the common schools in the State of Arizona; others are located on privately owned lands in other parts of the State or outside of the State. Assume that the State Legislature has concluded that the value of the remaining school lands in the section would quadruple if the atomic energy facility were located on the proposed trust land site. It would hardly serve the Enabling Act's basic purpose of value enhancement to hold that that Act forecloses the State from offering a free site for such a facility within the school land section as an inducement for construction of the improvement there.

The total context of the instant controversy does not present the problem so starkly as the foregoing hypothetical, but the two cases are inextricably bound up in the same legal package. The only issue of law in this case is one which necessarily resolves the hypothetical. That issue is: where the State of Arizona—acting through appropriate departments of its government—concludes that the value of the trust would be either preserved or enhanced by utilizing designated parcels of trust lands in a particular way other than exchanging such lands for cash, is the Enabling Act to be so narrowly construed as to prohibit it from doing so.

In the instant case no evidence was presented at the hearing in connection with the promulgation of Rule 12 to contradict the continuing validity of these earlier factual determinations. Under such circumstances, the Arizona Court simply declined to overturn its holdings in the two prior cases that as a matter of fact the construction of highways across trust lands in Arizona results in a net value enhancement to these trust lands.

The Petitioner's brief is replete with statements and implications that the trust established by Congress is being dissipated because of the Arizona Court's holding. The sole support for these statements is their repeated assertion in the Petitioner's brief. An attempt to upset factual determinations of the highest court of the State of Arizona stretching over a period of 25 years must rest upon a more firm foundation than the Petitioner's own rhetoric.

At the time that the Petitioner adopted the rule which gave rise to this litigation, he was of course aware of the two holdings of the Arizona Supreme Court handed down in 1938 and 1945. He was also aware of the factual underpinnings of those cases. If the Petitioner feels that the factual foundation of those cases was wrong, the time and place to have presented evidence to that effect were available: the proceeding in the Land Department itself in which the Department's Rule No. 12 was promulgated. Instead, the Land Department elected to wait until a Writ of Prohibition was brought against the enforcement of this rule, and then simply rely—as it does here—upon a conclusionary assertion that the Arizona Supreme Court was wrong.

Implicit in the Petitioner's repeated factual assertions is a recognition that if the Arizona Court's determination is to be

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<sup>4</sup>In *State v. State Land Department*, the Court held that "... the natural tendency of the grant [of a right of way for a public road] across such lands . . . is to enhance rather than to lessen their salable or rentable value." 62 Ariz. at 254.

upset, there must be evidence that the foundation of that decision is faulty. We agree. But the appellate stage of a lawsuit is too late for the parties to start introducing evidence.

The basic factual posture of the case makes it inappropriate for review by this Court. It is therefore respectfully submitted that the Writ of Certiorari should be dismissed as improvidently granted, and the legal issue left for another case whose procedural posture makes it a fit vehicle for consideration by this Court. *Cf. Hicks v. District of Columbia*, 383 U.S. 252, 86 S.Ct. 798 (1966).

## *II. The Arizona Supreme Court's Interpretation of its Own Enabling Act is a Permissible One.*

Assuming *arguendo* that factual deficiencies could be cured by conclusionary assertions, the only legal issue in this case is whether the Arizona Supreme Court's interpretation of the Arizona Enabling Act is an interpretation which the Arizona Court is entitled to make. Three provisions—two restrictions and a savings clause—contained in Section 28 of the Enabling Act are crucial to the determination of that issue.

The first restriction is very specific, prohibiting sale or lease "except to the highest and best bidder at a public auction to be held at the County seat of the County wherein the lands to be affected, or the major portion thereof shall lie . . ."; precise details concerning the conduct of the auction are also set forth.<sup>5</sup> The other, more general restriction, requires simply that lands "shall be appraised at their true value and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

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<sup>5</sup>Notice of the public auction must be given by advertisement ". . . published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered. . . ." Arizona Enabling Act, Section 28.

The savings clause appears toward the end of Section 28, and provides that "every sale, lease, conveyance, or contract . . . *not made in substantial conformity* with the provisions of this Act shall be null and void. . . ." (Emphasis added.)

#### A. *The Public Auction Requirement*

The evil which the trust provision scheme was primarily intended to prevent was the sacrifice of public lands for private gain, such as was involved in the "tall timber" cases which were chiefly responsible for the trust land restrictions. See S. Rep. No. ss 454, 61st Cong., 2d Sess. at 1920 (1910); 45 Cong. Rec. 8227.

Unquestionably, a requirement that lands not be disposed of except to the highest bidder at public auction is a most effective means of insuring against private exploitation of public lands. But the use of public lands by the public itself for highway purposes is an entirely different matter. Neither the Petitioner, nor the Respondent, nor the State of New Mexico, nor the United States, nor so far as we are aware, anyone else, would favor the disposition of lands to be used for highway material sites or rights of way to the highest bidder at a public auction which must be held in the county where the lands are located and advertised in two newspapers at least once each week for ten weeks prior to the auction date. Such a procedure would merely result in senseless delay and costs which would ultimately have to be borne by the public itself.

In our view, the public auction provisions do not apply to highway or other public uses because they were not intended so to apply, and because the substantial conformity provision saves them from such application.

The obvious purpose of the public auction provisions was to prevent private profiteering in public lands. In all likelihood, Congress simply did not consider the question whether the public auction provisions should apply to highway uses; had it so considered, it probably would have concluded—as all parties concerned now conclude—that they should not. Congress did recog-

nize very clearly, however, that it could not divine in 1910 all of the possible problems which would arise throughout the ensuing decades in which the Enabling Act would endure. Congress further recognized that if the Enabling Act's trust provisions were to be workable, sufficient elbow room must be allowed for the State to deal with particular problems not foreseen and specifically resolved by the Act itself. Consequently, it provided that only transactions *not made in substantial conformity* with the provisions of the Act should be null and void.

The inappropriateness of public auction to dispose of lands for public purposes bears out the wisdom of the Congressional judgment to allow the State leeway in implementing its own Act so long as in substantial conformity with the Act's provisions and without detriment to the trust.

The Petitioner has a different solution to the dilemma, but one that is clearly inconsistent with the language of the Act itself. The Petitioner suggests that trust lands may be acquired by the State by eminent domain notwithstanding the public auction provisions. This proposal must fall of its own weight. Eminent domain and public auction are two distinct and mutually exclusive means of acquiring land. If these lands must be disposed of only by public auction regardless of the purpose for which they are to be used, then they cannot be acquired by eminent domain.<sup>6</sup>

The issue which the Petitioner refuses to face—presumably

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<sup>6</sup>The Idaho Supreme Court in *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903), adopted the same reasoning urged here by the Petitioner. The Respondent agrees with the Montana Supreme Court that the Idaho decision ". . . simply amounts to a declaration that the Congress of the United States did not mean what it said when it commanded that sections 16 and 36 in every township should be sold at public sale." *State ex rel Galen v. District Court*, 42 Mont. 105, 112 Pac. 706, 708 (1910).

The Enabling Act for the States of North Dakota, South Dakota, Montana and Washington, Act of Feb. 22, 1889, Ch. 180, 25 Stat. 676, with which the *Galen* Court dealt, did not contain a substantial conformity provision.

because either answer is inimical to his position—is this: do the public auction provisions apply to lands used for highway purposes or do they not? If the answer is yes, then eminent domain is clearly precluded.

It is the Respondent's position that the public auction provisions do not apply to highway uses because Congress did not intend them to apply, and because Congress' failure specifically to except lands for highway uses from the public auction provisions—probably because Congress did not consider the matter—is saved by the substantial conformity provision.

The Petitioner would of course be reluctant to resolve this problem by relying on the substantial conformity provision of the Act because of the import of this discretion-creating provision to the interpretation of the broader and clearly applicable restriction contained in Section 28, namely, that value be obtained for lands disposed of. We turn now to a discussion of that value issue.

#### *B. The Value Requirement*

The Petitioner staunchly and repeatedly asserts that no disposition of trust lands may be made except in conformity with the provisions of the Act. On this point, we are in complete agreement. But the attempted leap from the conceded premise that the provisions of the Act must be complied with, to the proposition that cash or specific dollars must be paid for every parcel of ground disposed of, is not consistent with the Act itself.

Petitioner's assertions notwithstanding, the Arizona Enabling Act may be searched from one end to the other without finding the words "specific dollars", or "cash in hand". The legislative history of the Act is similarly devoid of any reference to "cash in hand", or "specific dollars". The requirement is rather that "no sale or other disposal thereof shall be made for a consideration less than the value. . ." If the draftsmen of the trust provision had intended that the only remuneration for these lands were

to be specific dollars, they would have said so. Instead they chose a broader, more flexible requirement: that no disposition be made except for "value". Not "cash", but "value". As discussed above, further flexibility was provided by interdicting only those conveyances not made in substantial conformity with the provisions of the Act. Under the aegis of these two provisions, the holding of the Arizona Court that "value" in the present context contemplates value to remaining lands as well as lands taken is a determination which the State of Arizona, acting through its courts, is entitled to make. The permissibility of this interpretation is further supported by the following:

1. Interpretations which have been placed upon similar provisions appearing both in enabling acts and in state constitutions, by the courts of other states.
2. Interpretations which have been placed upon this particular enabling act by the governmental bodies charged with its enforcement.
3. The general principles—based upon comity and constitutional doctrine—which have been set forth by this Court pertaining to the discretion and leeway which should be allowed the individual states in interpreting and implementing their respective enabling acts.
4. Congressional judgment reflected in the absence of narrow restrictions on lands conveyed to the State of Alaska by the Alaska Admission Act.

#### *1. Decisions of Other States*

The decision chiefly relied upon by the Arizona Supreme Court in its *Grossetta v. Choate* and *State Land Department* decisions was *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3 (1924), on rehearing 31 Wyo. 464, 228 Pac. 642 (1924).<sup>7</sup> The Wyoming Enabling Act provides that certain lands be "selected and withdrawn from sale and located . . .

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<sup>7</sup>The Petitioner represents that the *Ross* decision is now followed only as to certain kinds of lands. If true, this is irrelevant, since an election

for the use and support of a university," and that "none of said lands shall be sold for less than \$10.00 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said state and the income thereof be used exclusively for university purposes." The State Constitution further requires that the lands be disposed of only at public auction.

The Wyoming Supreme Court upheld the use of these lands for highway construction purposes on the same grounds as adopted by the Arizona Supreme Court. The following excerpts from the opinion are illustrative:

"In acts of that kind we see a congressional recognition of public necessity of the improvements thus aided, and a purpose to enhance the value and hasten the settlement of the public lands affected."

....

"[Public roads] are as necessary across public lands held by the state under these grants as they are across similar lands still held by the United States, *and their establishment is as likely to enhance the value of the former as the latter.*"  
228 Pac. at 5-6. (Emphasis added.)<sup>8</sup>

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by the Wyoming highway authorities not to pursue a favorable decision is solely an internal Wyoming matter. Moreover, the representation itself is one of many self-serving assertions which pervade the Petitioner's brief and which are without support in the record.

<sup>8</sup>On rehearing, the Wyoming Supreme Court further elaborated upon the basis for its holding:

"The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and maintaining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held, or of the constitutional restrictions upon its disposal. *For the natural tendency*

*of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.' (Emphasis added.)*

Other courts have reached similar results. The New Jersey Court, in discussing what uses the State of New Jersey could make of lands "irrevocably devoted to the support of free public schools" by the Constitution of that State, made these observations in *Henderson v. Atlantic City*, 64 N.J. Eq. 583, 54 Atl. 533 (1903):

"[The State] could probably grant a perpetual right to lay out streets or highways through it, *regarding the presence of such streets as likely to enhance the value of this property.* So, too, perhaps a privilege could be granted to a municipality to use it as a park *until such times as the State thought it to the benefit of the school fund to transmute the land into money by sale or lease.*" (Emphasis added.)

*United States v. The Railroad Bridge Company*, 6 McLean 517, Fed. Cas. No. 16,114 (N.D. Ill. 1855), was a case involving a right of way across public lands of the United States, which at one time had been reserved for military purposes. The opinion was written by Mr. Justice McLean, then an Associate Justice of the United States Supreme Court, who stated:

"In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and *increase the value of land.* In no respect is the exercise of this power by the state inconsistent with a fair construction of the constitutional power of Congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value." (Emphasis added.) (The foregoing language was cited in *Ross v. Trustees of University of Wyoming* (on rehearing), 31 Wyo. 464, 228 Pac. 642, 646 (1924))

The Supreme Court of Minnesota, in answer to a contention that a statute granting a right of way to railroad companies over school or university lands held by the State was repugnant to a provision in that State's Constitution forbidding the sale of such lands other than by public auction, stated in *Lawver v. Great Northern R. Co.*, 112 Minn. 46, 127 N.W. 431, 432 (1910):

"We doubt the soundness of this contention. The constitutional provision was intended to prevent the secret sale and possible sacrifice for an inadequate price of that portion of the public domain granted to the state for educational purposes. *The construction of the railroad across such lands would not only bring them into the market, but add materially to their market value.* The sale of a right of way by auction would necessarily be farcical or afford a means for preventing a public improvement. In interpreting a constitutional provision, a court is required to use common sense, and place upon it a practical construction, as fully as when construing a legislative enactment." (Emphasis added.)

In the instant case, as in the *Ross* case and other cases cited in the preceding footnote, the disposition of a given parcel without exacting specific compensation therefor could of course be held to deplete the trust fund—if only that single parcel were considered. But it does not follow that the value of the entire trust has in fact been diminished. The Arizona Court and other courts have held that there is no such diminishment, and that on that basis, the provisions of the Enabling Act have not been violated.

Petitioner places strong—though misguided—emphasis upon this Court's decision in *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75 (1919), and the opinion of the Court of Appeals for the Eighth Circuit in the same case. *United States v. Ervien*, 246 Fed. 277 (8th Cir. 1917). *Ervien* was an action brought by the United States Attorney General to invalidate a New Mexico statute providing that 3% of the proceeds of all land sales should be used for the purpose of "making known the resources and advantages of this State generally. . . ."

The Respondent agrees with the United States that *Ervien v. United States* simply did not involve the same problem as this case. The key to the *Ervien* holding, as revealed by the Court of Appeals' opinion, is that while the trust lands comprised only about 1/26 of the area of the State, the proceeds of these lands were to be used for the benefit of the entire State. The opinion points out that the various trusts established by the Act are to be used for the benefit of the designated beneficiaries, and not the general public—the intended beneficiary under the challenged New Mexico statute. The soundness of this reasoning is as apparent as its inappropriateness to the instant case. Even assuming that there would be any value increment resulting from advertising—an assumption which the opinion of this Court in the *Ervien* case questions—the New Mexico scheme still re-

quired that 1/26 of the lands of the State support an advertising program for the entire State.<sup>9</sup>

The problem with which the Arizona Court dealt was not how trust fund proceeds are to be utilized, but rather how the value of the land which will one day be converted into such funds is to be maintained. In resolving that issue, the Arizona Court followed the mandate of this Court and the Court of Appeals in the *Ervien* case that these lands and their proceeds not be regarded as general funds, but as particular funds for particular purposes. The value increment which the Arizona Court found was not an increment to State resources in general, but to the particular trust lands which the highways traversed.<sup>10</sup>

The real relevance of *Ervien v. United States* is that it demonstrates conclusively that where state practices are in fact in violation of the New Mexico or the Arizona Enabling Acts, the federal officer charged with enforcing these federal statutes—the

<sup>9</sup>The Court of Appeals opinion states:

"Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people, or that the proceeds should constitute a fund like moneys raised by taxation for 'general purposes.' Nevertheless, the state legislative act in question proceeds upon such a theory.

"If additional advertisements of the state at large and its resources are deemed advisable, the cost should come from available public funds, not from those of the trusts. The proposed campaign of publicity is for the general advancement of the state. It has no immediate or direct bearing upon the trust lands or purposes except as they are within and pertain to the state at large." 246 Fed. at 280.

<sup>10</sup>The Petitioner emphasizes dictum contained in one sentence of the Court of Appeals opinion stating that trust funds could not be used to construct highways throughout the State. This sentence must be read against the background of the discussion which preceded it, dealing with the fundamental problem of the case: utilization of moneys produced by 1/26 of the State's lands to benefit the entire State. The situation which the dictum envisioned involved the use of trust fund moneys to pay the actual cost of construction of highways throughout the State.

United States Attorney General—has taken the necessary corrective action.

## *2. Interpretation by the United States Attorney General*

Primarily responsibility for enforcing the trust provisions of the Enabling Act, and assuring the vindication of the federal policy contained therein, is vested in the United States Attorney General.<sup>11</sup> The Act further provides that its designation of the Attorney General as the enforcement authority shall not be taken "as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."<sup>12</sup> Thus, two governmental bodies are charged with the responsibility of enforcing the trust provisions of the Act: the United States Attorney General and the State of Arizona. Significantly, the interpretations of both the Attorney General and the State of Arizona—implicit in one case and explicit in the other—have been the same.<sup>13</sup>

The practice presently under attack by the Petitioner is of more than fifty years standing in the State of Arizona. *State v. Lassen*, 99 Ariz. 161, 162, 407 P.2d 747 (1965). During this more than one-half century, the Attorney General has never taken steps to prevent the practice as violative of federal policy contained in the Enabling Act.

<sup>11</sup>"It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its court, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom." Arizona Enabling Act, Section 28.

<sup>12</sup>*Ibid.*

<sup>13</sup>According to S. Rep. No. 454, 61st Cong., 2d Sess. (1910) the provision for enforcement by the Attorney General was the most important difference between the House and Senate versions of the Act. That report states: "The Senate bill, while somewhat more specific, is not notable for any marked innovation unless it be found in the express provision for its enforcement by the action of the Attorney General." (*Id.* at p.19.)

This acquiescence has not been through inadvertence. In those instances in which practices occurred which decreased the value either of the trust lands, or the funds resulting from disposition of these lands, the Attorney General has been quick to act. Prior to enactment of the Enabling Act, there had been violations of similar trust land restrictions placed upon the territory of New Mexico by a grant of lands to that territory. Twelve lawsuits, known as the "tall timber" cases, referred to above, resulted from these violations; all of the suits were brought by the United States Attorney General's Office. S. Rep. No. 454, 61st Cong., 2d Sess., p. 34 *et seq.*

In 1915 the State of New Mexico enacted a statute providing that funds resulting from the sale of trust lands should be used to advertise the resources and advantages of the State of New Mexico. The United States Attorney General's Office was successful in having this statute invalidated as repugnant to the New Mexico Enabling Act. *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75 (1919).

The action of the Attorney General in *Ervien v. United States* was swift and decisive. Yet at the very time that the *Ervien* litigation was taking place, Arizona was utilizing portions of its trust lands for the construction of highways, and the Department of Justice made no move to prevent it. *State v. Lassen*, 99 Ariz. 161, 162, 407 P.2d 747 (1965).

Any doubt which might have remained as to the United States Attorney General's position in this matter was certainly dispelled by litigation which was instituted in 1962 by the Petitioner in the Federal District Court for the District of Arizona, in an attempt to secure the same judicial determination which the Petitioner seeks here. *State of Arizona, Trustee, ex rel State Land Department v. State of Arizona*, Civil Case No. 4517 Phx., filed in United States District Court for the District of Arizona, December 3, 1962.<sup>14</sup> Named as defendants in that case were

the Arizona State Highway Department, the State Highway Commission, the State Highway Director and the United States of America. The reason for joining the United States as a defendant was set forth in paragraph IV of the Complaint, which stated as follows:

"The United States of America is made a party as grantor of the lands involved and for the reason that under the provisions of Section 28 of the Enabling Act of Arizona, supra, the United States placed conditions and restrictions upon the State in respect to the sale, lease, conveyance, contracts of or concerning the lands granted or confirmed or the use thereof or the natural products thereof and upon any money or thing of value derived therefrom and further made it the duty of The Attorney General of the United States to prosecute in the name of the United States and in its Courts, such proceedings at law, or in equity, as may from time to time be necessary and appropriate to enforce the provisions of the Enabling Act relative to the application and disposition of the lands so granted and confirmed and the products thereof and the funds derived therefrom."

The United States Attorney General filed a Motion to Dismiss on behalf of the United States. One of the memoranda in support of the Motion to Dismiss argued, *inter alia*, that "the relief sought by the Complaint in this action (that the Attorney General, in his official capacity, enforce the provisions of the Act) is relief in the nature of mandamus" and that only the United States District Court for the District of Columbia had jurisdiction to grant such relief. The Complaint and the memorandum filed by the United States in which the foregoing language appears are set forth in the Appendix to this Brief.

Thus, the Attorney General is not only aware of his responsibilities under the Act; he has formally opposed efforts by this Petitioner to force his Department to take the Petitioner's side

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<sup>14</sup>We respectfully request that this Court take judicial notice of this United States District Court case, and all pleadings and documents filed therein. *Brown v. Board of Education*, 344 U.S. 1, 73 S.Ct. 1 (1952).

in this dispute. The fact that he has opposed these efforts compels the conclusion that the Attorney General has not regarded Arizona to be in violation of its Enabling Act.<sup>15</sup>

It is well settled doctrine that interpretations placed upon a federal statute by the federal agency charged with the responsibility of its enforcement is entitled to great weight in determining the meaning of the statute. As this Court reaffirmed in *Udall v. Tallman*, 380 U.S. 1, 23, 85 S.Ct. 792, 805 (1965), "To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

In some cases—such as here—the agency's agreement with an existing interpretation can only take the form of acquiescence through non-imposition of available sanctions. This Court has held that ". . . just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant. . ." *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349, 352, 61 S.Ct. 580, 582 (1941).

The striking fact about the Attorney General's interpretation in this case is that it is of more than 50 years standing. Interpretations with such history behind them are "persuasively determinative of [the statute's] construction." *United States v. State of Minnesota*, 270 U.S. 181, 205, 46 S.Ct. 298, 305 (1926). See also *United States v. State of Wyoming*, 331 U.S. 440, 67 S.Ct. 1319 (1947); *California v. Desert Water Oil & Irrigation Co.*, 243 U.S. 415, 37 S.Ct. 394 (1917); *Border Line Transp. v. Haas*,

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<sup>15</sup>In its Brief before this Court, the Department of Justice takes only a slightly different position from that of the Arizona Supreme Court. This position will be discussed under Section III of this Brief; it can be best appreciated, however, against the background of what the Department has done over the past fifty years.

128 F.2d 192 (9th Cir. 1943), cert. denied 318 U.S. 763, 63 S.Ct. 662 (1943).

### 3. State Discretion in Interpreting and Implementing State Enabling Acts

Interpreting Arizona's Enabling Act as not conferring upon the State the discretion of selection among possible reasonable means of satisfying the value requirements of the Act might raise serious constitutional questions. This Court has held that the doctrine of equality of states requires that each state admitted subsequent to the original 13 states be entitled to a broad range of permissible activity in implementing its own Enabling Act. *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688 (1911); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 2 S.Ct. 185 (1883).

The general principle is illustrated by *Coyle v. Smith, supra*. On June 16, 1906, Congress passed the Enabling Act for the State of Oklahoma 34 Stat. 267 (1906). One of the provisions of Section 2 of that Act was that "the capital of said state shall temporarily be at the City of Guthrie . . . and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen. . ." 31 S.Ct. at 689. On December 29, 1910, the State of Oklahoma passed an Act providing for the immediate relocation of the State capital at Oklahoma City. Litigation ensued challenging the validity of the 1910 Act. This Court held that notwithstanding its obvious repugnance to the provisions of the Enabling Act, the Oklahoma statute was valid, on the ground that to deprive Oklahoma of the right to determine such matters as the location of its state capital would violate the constitutional doctrine that all states must be admitted by Congress on an equal footing with the original 13 states.

This is not to suggest that under the mantle of *Coyle v. Smith* Arizona could completely dispense with the value requirement of its Enabling Act. The Petitioner is correct in contending that

such requirements are properly imposed as incident to the disposition of public lands.

The significance of *Coyle v. Smith* is, rather, the leeway which it implies in the states in dealing with enabling act provisions which are particularly within the ambit of state responsibility and expertise.

Starting from the *Coyle v. Smith* premise that a state may completely turn its back on certain types of restrictions which relate exclusively to state problem areas, it follows *a fortiori* that it is within the state's power to select from various reasonable interpretations which a given enabling act provision permits, that particular interpretation which in the state's view best fulfills the policy of the provision.

If the State of Oklahoma may flatly overrule the Congressional mandate in its Enabling Act that the state capital remain in Guthrie until 1913, Arizona may hold that value includes value to trust lands as a whole, and is not restricted to requiring specific dollars for each square foot of land in which any rights are granted at the time such rights are granted.

Even if not required by constitutional doctrine, the interpretation and implementation of enabling acts by the individual states so long as reasonably consistent with the Acts' requirements would be indicated as a matter of sound policy. The function of enabling acts is to establish the new state on an equal footing with its sister states and to mark out broad general policy guide lines for the state to follow. Since Congress cannot at the time of passage of an enabling act foresee all of the possible problems which may arise, most restrictions must necessarily be set forth as broad general principles. Once these guide lines are established, the implementation of the general policy within the bounds set by the guide lines should be left to the states themselves.

This is particularly true where the basic problems fall within

areas over which the state itself has either primary or exclusive responsibility. The provision of schools, insane asylums, miners' hospitals, institutions for the blind, and similar institutions in the State of Arizona are the responsibility of the State of Arizona. Setting the standards according to which these institutions are to be operated and determining the total amount of money to be used therefor are similarly the state's responsibility. To whatever extent the trust funds are not sufficient to support these institutions according to standards which are set by the state, it is the state which must provide the difference through tax-raised funds.

Moreover, the legislature and the courts of the state are in the best position to determine under what circumstances value has been obtained, and how the value requirements of the Act can be most effectively administered. It is clearly within the power of Congress to provide in a state enabling act that certain lands conveyed to the state be held in trust; that the lands and their proceeds be devoted to help defray designated state expenses; and that the lands not be disposed of except for value. Equally clearly, selection of the particular means of carrying out the policies of the enabling act—in this case determining under what circumstances value has been obtained—can be most effectively accomplished by the state itself, acting through its various departments of government.<sup>16</sup>

For these same reasons, the conflict between the holding in this case and the New Mexico Supreme Court decision in *State ex rel State Highway Comm'n v. Walker*, 61 N.M. 379, 301 P.2d 317 (1956), is more conceptual than real. Although the Enabling Act provisions of the two states are practically the same, there is nothing inconsistent in New Mexico's interpreting its Act more narrowly than Arizona. The only relevant question for

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<sup>16</sup>The Petitioner correctly observes that enabling acts, once passed, are more difficult to amend than other Congressional legislation. This is an additional reason why such acts should not be narrowly construed.

purposes of this case is whether the Arizona interpretation is a reasonable and therefore permissible one.

#### *4. Congress and the Alaska Enabling Act:*

##### *The Verdict of a Half-Century's Experience*

We agree with Petitioner that subsequent Congressional legislation is not determinative as to the meaning of what was done in 1910. However, neither is it necessarily irrelevant. If Congress had felt—based upon what actual experience revealed during the fifty years between the admission of Arizona and the admission of Alaska—that the Arizona Act, as interpreted, was too lax, it is logical to assume that more stringent, or at least more specific, limitations would have been imposed upon the new State of Alaska. Instead, Congress gave to Alaska the right to claim outright, with no restrictions whatever, 102,550,000 acres—more than one-third more land than is contained in the entire State of Arizona.<sup>17</sup> The Alaska Act does not repeal the trust provisions of the Arizona Act. It does provide additional evidence that Arizona and other states with public trust lands have not abused their trust and that Arizona's interpretation of its Enabling Act—that value is to be determined from the standpoint of all trust lands, and not just the particular parcels taken—is a permissible interpretation.

#### *III. The Position of the United States Attorney General Before This Court*

The United States, as *amicus curiae* before this Court, agrees with the Respondent and the Arizona Supreme Court on the broad issue, that Arizona may utilize trust lands for highway purposes so long as the total value of the trust is not thereby diminished.

The sole point of departure therefore, between the United

<sup>17</sup>Section 6 (b), Alaska Admission Act, 72 Stat. 339, 340 (1958). Additional lands are also conveyed, subject to minimal restrictions. Section 6 (a), *supra*. Arizona's total land area is 72,688,000 acres. See 1965 *Public Land Statistics*, p. 11, published by United States Department of the Interior, Bureau of Land Management.

States on the one hand, and the Respondent and the Arizona Supreme Court on the other, is: upon whom does the burden fall of showing whether in fact the devotion of trust lands to highway purposes does or does not result in a preservation or enhancement of the trust corpus. Alternatively, the issue is whether the holding of the Arizona Supreme Court that in fact the trust does not diminish in value as a result of highway construction across portions of the trust lands is entitled to any weight at all, or whether it may simply be rejected out of hand as though it never existed.

We submit that at the very least, the Arizona Supreme Court's determination is entitled not to be rejected without being disproven. Our reasons are two:

- A. The determination of factual questions such as these falls within the scope of the discretion vested in the State by the Enabling Act.
- B. The Arizona Court's decision is consistent with the only systematic studies which have been conducted on this problem in general, and also with other evidence which the Arizona Supreme Court could have taken into consideration.

#### *A. State Discretion and Questions of Fact*

Everyone concerned in this matter, including the United States, agrees that the State must be given leeway in interpreting and implementing the trust provisions of its Enabling Act, so long as such implementation is in substantial conformity with the trust provisions. But having recognized that doctrine, and under its aegis having agreed that the public auction provisions do not apply to public lands for highway purposes, the United States would ignore the force of the doctrine as it applies to the resolution of issues of fact. If the Enabling Act permits the State to hold the public auction provisions inapplicable to highway uses and to consider value from the standpoint of the entire bundle of trust lands—and clearly it does—then it would seem to follow *a fortiori* that the courts of the State must be

permitted to ascertain whether in fact there has been a value enhancement.<sup>18</sup>

The United States characterizes the Arizona Court's determination as a "blanket presumption" and argues that surely there must be some state highway projects as to which, considered in isolation from all other parts of the state highway construction program, the value of the lands taken is greater than the resulting value enhancement. Assuming *arguendo* that this may be true, the premise of the argument is at odds with the fundamental view—shared by the United States—that in determining value, the effect of a given state program on *all* state trust lands must be taken into consideration.

The Arizona State Highway construction program is a statewide program. It is no more consistent to restrict the consideration of value return to a single taking or a single section than it is to restrict it to the few acres within a section which are actually taken. Therefore, even if there are individual projects as to which, considered in isolation, there is no net benefit, the State is entitled to offset against these the value enhancement resulting from other highway construction projects. The holding of the Arizona Supreme Court is simply that the utilization by the Highway Department of small portions of trust lands for the construction of highways in various parts of the State does not result in a net diminution to the value of the entire trust; this holding satisfies perfectly the requirement that trust

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<sup>18</sup>Normally, such a factual determination would be subject to review by this Court. This is not possible in the instant case, because of the peculiar way in which the case arose. As noted earlier, the factual determination on which the holding of the lower court rests was not made in this case. Because of the Petitioner's failure to present any evidence of any kind to show that the Court's earlier determinations are in fact inapplicable in light of present circumstances, the Court had no alternative but to affirm those former determinations. The opportunity still exists, however, for the Petitioner to disprove the factual basis of the Arizona Court's decision if he lays the proper groundwork.

lands be utilized for public purposes only where the total value of the trust is not lessened by such use.

*B. Facts Subject to Judicial Notice Consistent with the Lower Court's Factual Holding*

It is not possible to ascertain from this record the considerations which entered into the Court's factual determination. The determination is consistent, however, with facts which the Court could have taken into account. Studies have been conducted in other states concerning the effect of the construction of highways upon nearby property values. These studies have been summarized by Mr. Edward Sprague, former research analyst with the Department of Governmental and Economic Research of the New Jersey State Chamber of Commerce, as reflecting "overwhelming evidence that properly designed highways tend to increase the total property values of the areas served and thereby increase the local tax rateables. . ."<sup>19</sup>

The most comprehensive studies are two which have been conducted in the State of Texas. The first, conducted on a 5.4 mile stretch of the Dallas Central Expressway in 1956 and 1957, included unimproved land and areas zoned for commercial, manufacturing, and residential uses. The study compared changes in land values near the expressway before and after its construction with changes in value of equivalent lands located far enough from the expressway that they would not be effected by it. Lands near the expressway were divided into three bands, the first band consisting of property abutting on the frontage roads, the second consisting of property located within two blocks of the frontage roads, and the third extending to property four blocks from the frontage roads.

All types of property in the study section showed greater value increases than comparable lands in the control areas, but

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<sup>19</sup>Sprague, *The New Highways and Property Values*, THE HIGHWAY AND THE LANDSCAPE, 147 (Snow Ed. 1959).

the comparative increases in areas zoned for residential uses were less than the others.<sup>20</sup> Mr. Sprague concluded:

"Measured in terms of relative increases in land prices, the total benefits in the study section, within the first ten years following construction, were estimated at \$20 million to \$24 million, against a total construction cost of \$13 million."<sup>21</sup>

The second study was conducted along a 7.8 mile stretch of the Gulf Freeway running from a downtown area of Houston through the residential outskirts. The results were similar to those reflected by the Dallas study:

"Again it was shown that land immediately adjacent or in close proximity to the highway increased considerably more in value, as measured by sales of real property, than similar parcels of land in other parts of the city away from the

<sup>20</sup>*Ibid.* at 149. The comparative increases in land prices and tax valuations according to proximity to the expressway are shown by the following table prepared by Mr. Sprague:

**EFFECTS OF THE DALLAS CENTRAL EXPRESSWAY ON NEARBY  
LAND PRICES AND LAND TAX VALUATIONS**

<i>Location of Study Areas</i>	<i>Per Cent Increase in Study Areas Minus Per Cent Increase in Control Areas</i>	
	<i>Land Prices 1946-1955</i>	<i>Land Tax Valuations 1945-1955</i>
<i>Band A</i>		
Properties Abutting on Frontage Roads	563	304
<i>Band B</i>		
Properties Within Two Blocks of Band A	64	42
<i>Band C</i>		
Properties Within Two Blocks of Band B	84	18
<i>Id.</i> at 150.		

Although not directly relevant, the increase in land tax valuations emphasizes that highway construction also benefits state institutions such as the beneficiaries of the Arizona Enabling Act trusts by increasing the total tax bases from which these institutions derive most of their financial support.

<sup>21</sup>*Ibid.*

freeway. In fact, in the ten years following the start of construction (1946), the value of real estate abutting on the freeway increased more than twice as fast as in the control areas. As was the case in Dallas, commercial and undeveloped areas benefited the most.<sup>22</sup>

Systematic studies such as discussed above have not been conducted in the State of Arizona. However, tourism in Arizona has grown to the point that it provides the State's fourth largest source of income,<sup>23</sup> and Arizona historians recognize the important role that roads and highways have had in the development of the State's economy and the value of its lands.<sup>24</sup>

While there is not any evidence on this record specifically pointing to the correctness of the Arizona Supreme Court's decision, neither is there any evidence to dispute it. Members of the Arizona Supreme Court, whose roots are deep in the State and its history, who are elected by the people of the State of Arizona, and who are familiar with the conditions and the problems of Arizona, are qualified to make a judgment as to the rela-

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<sup>22</sup>*Id.* at 151. The Gulf Freeway study also showed that during a five year period prior to the public's realization that the freeway would be built, the increase in market value of lands adjacent to its future route was about the same as the median of increases in the control areas. After knowledge of the proposed freeway became general, properties adjacent or close to the facility increased to a greater extent than in any other section of the city. See *The Impact of Highways on Land Uses and Property Values* 26, 28 (1958), published by the Highway Traffic Safety Center and College of Business and Public Service, Michigan State University.

In addition to the Texas studies, Mr. Sprague discusses studies in California, New York, New Jersey and Massachusetts concerning the effect of highways on surrounding land values.

The New York, New Jersey, and Massachusetts studies disclosed results similar to those of the Texas studies. The California study was less conclusive—perhaps because only residential properties were involved—but not inconsistent with Mr. Sprague's general statement that the evidence is overwhelming that properly designed highways tend to increase nearby property values.

<sup>23</sup>H. Peplow, *HISTORY OF ARIZONA* 343 (1958).

<sup>24</sup>*Id.* at Chap. XX "Transportation and Tourism." See especially 389-97.

tionship between Arizona's highways and its land values, and the effect of highway construction on the value of large parcels of trust lands which these highways traverse. In light of the studies conducted in other states, particularly the State of Texas, Arizona's southwestern neighbor, and in light of the role which historians have assigned to highways in the development of Arizona, it is certainly not an unreasonable determination. At the very least, it should not be overturned by fiat, without any proof whatsoever that it is wrong. The long-standing nature of the determination, the acceptance which it has enjoyed over the years by the United States Attorney General, and the broad discretion that the State of Arizona enjoys in interpreting its own Enabling Act, require at least that the factual underpinning of the Arizona Court's holding not be set aside on a record which contains absolutely no evidence inconsistent with that holding.

### CONCLUSION

The Arizona Enabling Act is a Congressional statute. However, it is a statute which is peculiarly pointed toward State rather than national affairs, and which set policy guide lines not for the nation as a whole but for the State of Arizona and its particular internal problems.

Congress has vested the State of Arizona with substantial latitude in administering its trust lands and in implementing the trust land provisions of its own Enabling Act. The wisdom of this Congressional judgment is particularly apparent in the context of problems which lie within the exclusive realm of state responsibility. Such problems as whether payments should be made by one agency of the State of Arizona to another agency of the State of Arizona, and whether schools and other state institutions shall be maintained according to the standards set by the State of Arizona from one fund or another, are matters which should be left to the Arizona courts and Legislature, so long as the action taken is reasonably consistent with the purpose

and provisions of the Enabling Act. For reasons discussed above, it is respectfully submitted that the holding of the Arizona Supreme Court meets this test, and should therefore be affirmed.

Respectfully submitted,

DARREL F. SMITH  
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OF ARIZONA

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## APPENDIX

Complaint and Government's Reply to Memorandum in Opposition to Government's Motion to Dismiss in *State v. Arizona, Trustee ex rel State Land Department of State of Arizona, Through its Arizona Highway, et al.*, No. Civ. 4517-Phx.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, TRUSTEE, ex rel,  
STATE LAND DEPARTMENT by OBED  
M. LASSEN, STATE LAND  
COMMISSIONER,

Plaintiffs,

vs.

STATE OF ARIZONA, through its  
ARIZONA HIGHWAY DEPARTMENT;  
ARIZONA STATE HIGHWAY  
COMMISSION; JUSTIN HERMAN,  
State Highway Director; and the  
UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION  
No. 4517  
COMPLAINT  
IN  
DECLARATORY  
JUDGMENT

Plaintiffs for their complaint for Declaratory Judgment, allege as follows:

I.

That the State of Arizona is a sovereign State of the United States of America.

The State Land Department is a department of the State of Arizona charged with administration of all laws relating to lands owned by, belonging to and under the control of the State with power in the name of the State to commence, prosecute and defend all actions and proceedings to protect the inter-

est of the State in lands within the State or the proceeds thereof.

Obed M. Lassen is the duly appointed, qualified and acting State Land Commissioner of the State of Arizona, with powers co-extensive with the powers of the State Land Department and is the Executive Officer of the State Land Department.

The Arizona Highway Department, control of which is vested in the Arizona State Highway Commission, is a department of the State of Arizona with jurisdiction and duties as set forth in Title 18, Chapter 1, Arizona Revised Statutes.

Justin Herman is the duly appointed, qualified and acting Chief Executive and Administrative Officer of the Arizona State Highway Department.

## II.

This action is brought under authority of the Judiciary Act, 28 U.S.C., Section 1331, wherein the matter in controversy exceeds the sum of \$10,000.00, exclusive of interests and costs and arises under a law of the United States, to wit: the Enabling Act of the State of Arizona, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, as amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51.

## III.

This action is further brought pursuant to the Declaratory Judgment Act, 28 U.S.C., Section 2201, to determine the rights, status and legal obligations of the State of Arizona, as trustee of school and institutional lands granted and confirmed to the State of Arizona under the Enabling Act of the State of Arizona, Supra.

## IV.

The United States of America is made a party as grantor of the lands involved and for the reason that under the provisions of Section 28 of the Enabling Act of Arizona, Supra, the United States placed conditions and restrictions upon the State in respect

to the sale, lease, conveyance, contracts of or concerning the lands granted or confirmed or the use thereof or the natural products thereof and upon any money or thing of value derived therefrom and further made it the duty of The Attorney General of the United States to prosecute in the name of the United States and in its Courts, such proceedings at law, or in equity, as may from time to time be necessary and appropriate to enforce the provisions of the Enabling Act relative to the application and disposition of the lands so granted and confirmed and the products thereof and the funds derived therefrom.

#### V.

That since statehood, the Arizona Highway Department, having administrative management and control of the location, construction, operation and maintenance of the public roads of this State, designated as state highways, has obtained the necessary easements and rights-of-way therefor, together with the necessary sand, gravel and base materials for the construction thereof from the school and institutional lands under the jurisdiction of the State Land Department without cost to the State Highway Department and without compensation in money or otherwise to the trust created by the Enabling Act.

#### VI.

In recent months, numerous applications have been made by the State Highway Department to the State Land Department for the use of school and institutional lands under the jurisdiction of the State Land Department for rights-of-way and material pits for highways; the State Land Department refused to grant such rights-of-way and material pits unless and until the Arizona Highway Department tendered and paid to the State Land Department such sums as the State Land Department determined and assessed for such use; that in order not to interfere with national security and preparedness by stopping or delaying the construction of interstate highways through Arizona, the State

Land Department has granted to the Arizona Highway Department, since on or about October 15, 1960, without charge, for rights-of-way in excess of 3,000.00 acres and for material pits in excess of 3,000.00 acres; the reasonable value thereof being in excess of \$1,000,00.00, resulting in a loss to the trust beneficiaries in excess of \$1,000,000.00; that the Arizona Highway Department has, in times past, obtained the use of school and institutional lands from the Arizona State Land Department for the purpose of maintenance camps, radio transmitters and repeater stations on payment of a nominal sum only, not based upon an appraisal of the true value of the interest.

## VII.

That the Enabling Act of the State of Arizona, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, as amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51, after granting certain lands to the State for the support of common schools and other designated purposes, provides in part as follows:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

..... Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie,

notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. . . . .

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . . .

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. . . . .

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. . . . ."

### VIII.

That the New Mexico Enabling Act, likewise being Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, Section 10, contains provisions substantially identical with the hereinabove quoted portions of Section 28 of the Arizona Enabling Act.

## IX.

That the Arizona Supreme Court has ruled that the Arizona State Highway Department is not required to pay for material sites and rights-of-way on, over or across school and institutional lands, *State ex rel Conway vs. State Land Department* (1945), 62 Arizona 248; 156 Pac.2d 901.

## X.

That the Supreme Court of the State of New Mexico under substantially identical Enabling Act provisions has ruled that the State Highway Department is required to pay for material sites and rights-of-way, on, over or across school and institutional lands, *State ex rel, State Highway Commission vs. E. S. Walker* (1956); 61 New Mexico 374; 301 Pac.2d 317.

## XI.

That the plaintiff, as a trustee, is jeopardized in the administration of the trust by conflicting decisions of State Courts, including the highest Courts of the State of Arizona and New Mexico and is unable to determine the duties of the trustee; that the plaintiff is in danger of a determination by the United States Attorney General that the duties of the trustee are not being properly carried out and would be subject to an action brought by the United States to enforce the terms of the trust; that the plaintiff is in great doubt as to whether or not it should continue to act in accordance with the case law of the State of Arizona and to continue to grant, without payment of compensation, rights, privileges and conveyances to the State of Arizona or its political subdivisions.

## XII.

That an actual controversy exists between the State Land Department and the State Highway Department, the State Land Department alleging and the State Highway Department denying the following, to-wit:

(a) The Arizona Highway Department has no lawful right to the use of said school and institutional lands for state highway rights-of-way and to the use of dirt, sand, gravel and base materials from said lands for the construction of highways without payment of money compensation therefor to the State Land Department.

(b) That Section 28 of the Enabling Act prohibits the use of school and institutional lands for rights-of-way for highways without payment of money compensation therefor.

(c) That Section 28 of the Enabling Act prohibits the use of dirt, sand, gravel and base materials from school and institutional lands for state highway construction without the payment of money compensation therefor.

(d) That though there is no minimum price fixed by law for the use of State lands for rights-of-way for highway, or for dirt, sand, gravel and base materials for the construction of said highways, Section 28 of the Enabling Act requires the payment of money compensation therefor.

(e) That when the Arizona Highway Department has made a reasonable determination that a portion of the unoccupied school and institutional lands are necessary for a right-of-way for state highways, or that certain dirt, sand, gravel and base materials are necessary for the construction of a highway, the State Land Department has a lawful right to deny the Arizona Highway Department use for such purpose or to withhold the use upon the condition of payment of money compensation.

WHEREFORE, plaintiff prays.

1. That this honorable court enter a Judgment and declaration that the State Highway Department, the State Highway Commission and Justin Herman have no right to the use, conveyance, benefits or privileges in the lands granted to the State of Arizona under the Enabling Act for rights-of-way or any other purposes, nor the right to use dirt, sand, gravel, or other products

therefrom until they shall have executed the appropriate applications for necessary conveyance and paid or tendered unto the plaintiff adequate compensation therefor as determined by plaintiff in the manner required by the Enabling Act, a United States Statute, and for a further determination and adjudication as to the terms and conditions under which the Enabling Act will be properly enforced and adjudicating that the trust is or is not being properly administered in accordance with the interpretation placed thereon by the Court and by the United States as its grantor.

2. For a second and further determination that prior to the granting of any rights-of-way or the right to make use of the products of the state land and the materials thereof that the defendants, Arizona Highway Department, shall be required to make due and proper application to the plaintiff, as trustee, under the terms of this trust and under the laws and statutes of the State of Arizona and the Enabling Act, and to submit to acquiring lands or the use thereof or the natural products thereof in the manner set forth and subject to conditions contained in the Enabling Act.

DATED this 30th day of November, 1962.

ROBERT W. PICKRELL  
The Attorney General  
s/ Charles C. Royall  
CHARLES C. ROYALL  
Assistant Attorney General  
Attorneys for Plaintiffs  
159 Capitol Building  
Phoenix 7, Arizona

STATE OF ARIZONA )  
 ) SS.  
County of Maricopa )

OBED M. LASSEN, being first duly sworn on oath, deposes and says:

I am the duly appointed and qualified acting State Land Commissioner and I have read the foregoing Complaint in Declaratory Judgment and know the contents thereof and that the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

s/Obed M. Lassen  
OBED M. LASSEN  
State Land Commissioner

Subscribed and sworn to before me this 30th day of November, 1962.

Yvonne D. Argenziano  
Notary Public  
My Commission Expires Sept. 24, 1966.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

STATE OF ARIZONA, TRUSTEE  
ex rel, STATE LAND DEPART-  
MENT by OBED M. LASSEN,  
STATE LAND COMMISSIONER,

Plaintiffs,

vs.

STATE OF ARIZONA, through its  
ARIZONA HIGHWAY DEPARTMENT;  
ARIZONA STATE HIGHWAY COMMI-  
SSION; JUSTIN HERMAN, State High-  
way Director; and the UNITED  
STATES OF AMERICA,

Defendants.

NO. CIV.  
4517-PHX.  
Government's  
Reply to  
Memorandum  
In Opposition

**STATEMENT**

This action was filed in December, 1962 to obtain a determination of the rights and obligations of the State of Arizona as trustee of school and institutional lands which, together with lands for other purposes, were granted to the State under the Enabling Act of New Mexico and Arizona, Act of June 20, 1910, c. 310, 36 Stat. 577, as amended by the Act of June 5, 1936, c. 517, 49 Stat. 1477, and the Act of June 2, 1951, c. 120, 65 Stat. 51.

The next to last paragraph of Section 28 of the Enabling Act with respect to Arizona names the Attorney General of the United States as the official to enforce the provisions of the Act relating to the use and disposition of lands. For this reason the plaintiff has brought this action in the Federal District Court naming the United States as a party defendant and not the Attorney General.

**ARGUMENT**

The United States Attorney has filed this motion to dismiss the action as to the United States on the ground that under the statutes relied upon by the State, including the Enabling Act, the government has not consented to be sued in an action of this nature and for that reason the Court lacks jurisdiction.

The United States, as sovereign, is immune from suit save as it consents to be sued. Since waivers of sovereign immunity are to be strictly construed, the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

We find nothing in the Enabling Act which even suggests a waiver of immunity. The duty imposed on the Attorney General is one of enforcement; prosecution thereunder is left to his discretion. Moreover, a suit against the Attorney General, if one can be brought at all, definitely could not be maintained in Arizona in the circumstances here involved, his official residence being Washington, *D. C. McCartney v. Hoover*, 151 F.2d 694 (C.A. 7, 1945); *Nesbitt Fruit Products Co. v. Wallace*, 17 F. Supp. 141. It is also to be noted that the Act gives the State or any of its citizens the same power of enforcement as that vested in the Attorney General. (See last paragraph of Section 28). This would indicate that neither the Attorney General nor the United States is an indispensable party to any action to enforce the trust.

Furthermore, the relief sought by the complaint in this action (that the Attorney General, in his official capacity, enforce the provisions of the Act) is relief in the nature of mandamus. An action seeking such affirmative relief is a suit against the government which cannot be maintained as the United States has not consented to be sued in the Courts with respect thereto and also because the district courts are without power to grant writs of mandamus. *Updegraff v. Talbott*, 221 F. 2d 342 (C.A. 4,

1955). The only United States District Court having original jurisdiction to grant relief in the nature of mandamus is the United States District Court for the District of Columbia. *Kendall vs. United States*, 12 Pet 524, 618, 9 L. Ed. 1181; *Updegraff v. Talbott*, supra. Consequently, this type of suit cannot be brought in this District and, therefore, the Court lacks jurisdiction.

In connection with the Tucker Act, 28 U.S.C.A., Sec. 1346(a) (2) which plaintiff cites as additional authority for this action, the Supreme Court in the *Sherwood* case, supra, held that the concurrent jurisdiction of the District Court under the Tucker Act does not extend to any suit which could not be maintained in the Court of Claims. Since plaintiff's suit does not seek money damages from the United States and is not predicated on a breach of contract, it is clear that it could not be litigated in the Court of Claims, and, therefore cannot be maintained in the District Court.

For the reasons stated above this Court is without jurisdiction as to the United States of America and should grant its motion to dismiss.

Respectfully submitted,  
C. A. MUECKE  
United States Attorney  
ARTHUR E. ROSS  
Assistant U. S. Attorney

I certify that one copy of the foregoing was mailed on June 17, 1963 to:

State of Arizona	159 Capitol Building
Attn: Charles C. Royall	Phoenix 7, Arizona
Assistant Attorney General	Attorneys for Plaintiffs
ARTHUR E. ROSS	
Assistant U. S. Attorney	

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**IN THE SUPREME COURT OF THE UNITED STATES**  
October Term, 1966

Office-Supreme Court, U.S.  
FILED

OCT 10 1966

JOHN F. DAVIS, CLERK

**No. 84**

**OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,**

Petitioner,

*vs.*

**THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,**

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA**

**REPLY BRIEF OF PETITIONER**

**DARRELL F. SMITH  
THE ATTORNEY GENERAL OF ARIZONA**

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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 84

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OBED M. LASSEN, COMMISSIONER,  
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.  
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF ARIZONA

## REPLY BRIEF OF PETITIONER

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### Argument

#### I. *Introduction.*

Certain lands were given to Arizona and New Mexico by the United States when those states were admitted to the union. The grant of these lands under the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557 (1910), which is for this purpose the same for the two states, provided that those lands should be held in trust, principally for schools, and that any disposition for any other purpose "shall be deemed a breach of trust." The act further provided that the lands could be disposed of only upon sale after appraisal and that there should be no disposition except after appraisal of true value. This trust was accepted by the state. Ariz. Const. art. X, sec. 1.

The Arizona Supreme Court has held that despite this trust, the lands can be taken by the State Highway Department for

public roads without any compensation at all and, as is fully developed in the earlier papers, a utility which is in fact handling the representation for the Highway Department is waiting in the wings to enjoy the same privileges.

There are now before the court the Brief of Petitioner, a Brief of the United States as Amicus Curiae, and the Brief of Respondent. We believe that the issues drawn in those briefs are sufficiently sharp so that only a brief response will be useful.

## *II. The Position of the United States as to Determining the Standard of Value is Unsound.*

The United States agrees with Petitioner that the decision of the Supreme Court of Arizona should be reversed. It disagrees with Petitioner only insofar as Petitioner insists that the language of the act categorically requires that the lands must be appraised at their true value and that no disposition can be made "for a consideration less than the value so ascertained." The United States contends that adherence to the statute may end in "highly unrealistic results" because in some instances the building of the road may enhance the value of the lands. The government tells us that it can "see no objection in principle to the state's taking this factor into account." However, it acknowledges that this "represents a departure from standard eminent-domain principles." Brief of the United States, p. 19. The government agrees that even under its approach the burden would be on the Highway Department to prove actual enhancement.

With all due respect for the government's position, we submit its argument is addressed to the wrong forum. In our view, the result of the statute and of the regulation of the Land Commissioner which carries it into effect is not "highly unrealistic." But that issue is not here. If Congress wishes to change the statute, it can do so. As the matter stands under this act and under this trust, it would be impossible with the full resources of the English language to draft a more specific statute than one which provides, as does this Enabling Act, that the lands "shall

be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." (Quoted in Brief of Petitioner, p. 38).

### *III. The Enabling Act Does Not Permit Offsets for Enhancement To Be Deducted from Amounts Paid as Compensation.*

As an original matter, if there were no statute, a court might or might not offset enhancement in value to the remainder of the tract from the amount of compensation to be paid for the portion taken. See *Aaronson v. United States*, 79 F.2d 139 (D.C. Cir. 1935); see generally 145 A.L.R. 7 (1943). Dissatisfaction with this flexibility in particular cases has led to the enactment of various statutes requiring that offsets be applied.<sup>1</sup>

These statutes, however, deal with only narrowly defined categories of eminent domain proceedings. None cover the circumstances presented by this case. Where they do not apply, presumably the original pattern of permitting diverse approaches to the question of deducting offsets from the value of land taken would be permissible.

The New Mexico-Arizona Enabling Act approaches this question from a different direction. It too deals with the question of compensation for the taking of lands for certain public purposes, but takes the unequivocal position that these trust lands may only be disposed of after an appraisal of true value and payment of that price. This statute, it is submitted, by its unquestioned application to the present case completely disposes of the question whether offsetting benefits may be deducted from the value of lands taken. By providing a specific manner for the determination of value, no conflicting alternatives are permissible.

Respondent contends that the lands may be taken without compensation on the bland assumption that the roads will benefit

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<sup>1</sup>See, e.g., 33 U.S.C. Sec. 595 (1964); H.R. Rep. No. 350, sec. 7, 65th Cong., 2d Sess. (1918); S. Rep. No. 433, sec. 7, 65th Cong., 2d Sess. (1918); *Bauman v. Ross*, 167 U.S. 548, 17 Sup.Ct. 966, 42 L.Ed. 270 (1897) (discussing Act of Mar. 2, 1893, ch. 197, sec. 11, 27 Stat. 532).

the residue of the trust lands more than the loss of the land involved detracts. For the reasons already stated, we think that this is simply irrelevant. As a rule of law, this would not be accepted in Arizona as applied to any other lands than these trust lands. Arizona law permits only offsets to severance damages in eminent domain cases.<sup>2</sup> It is well settled in Arizona under A.R.S. Sec. 12-1122(A)(3) that the condemnor may deduct benefits only from damages to the remainder and not from compensation for the parcel actually taken. The Arizona Supreme Court in *Town of Williams v. Perrin*, 70 Ariz. 157, 217 P.2d 918 (1950), held that the lower court, in a condemnation action, did not "err in refusing to allow appellees' tenant to testify as to what benefit the water line would be to him," because:

"there was no evidence that the appellees would have the right to make use of the water therefrom. Moreover, since no evidence was introduced as to any damages which the pipeline had caused to the rest of the appellees' land, the issue of benefit to the remaining land was immaterial, since under A.R.S. 27-915(3) [now A.R.S. 12-1122] . . . where only a part of the tract is taken for public use, the benefits accruing to the residue may be set off against the damages thereto and not as against the value of the part taken." 217 P.2d at 920. (Emphasis supplied.)

See also *Suffield v. State*, 92 Ariz. 152, 375 P.2d 263 (1962).

The net effect is that if this offset so casually assumed by petitioner were allowed, the trust lands would be subject to a direct discrimination and would be the only lands in the State of Arizona which the state could take on any such theory. But for

<sup>2</sup>A.R.S. Sec. 12-1122(A)(3) provides:

"A. The court or jury shall ascertain and assess: . . . 3. How much the portion not sought to be condemned and each estate or interest therein will be benefited separately, if at all, by construction of the improvement proposed by plaintiff. If the benefit is equal to the damages assessed under paragraph 2 of this subsection, the owner of the parcel shall be allowed no compensation except for the value of the portion taken, but if the benefit is less than the damages so assessed, the benefit shall be deducted from the damages, and the remainder shall be the only damages allowed in addition to the value."

the reasons already stated, in this case Congress has not only not granted this privilege but has done the categorical opposite, setting the appraised value as a minimum price to be paid for the lands taken.

#### *IV. The Enabling Act Provisions Relating to Land Grants Are To Be Narrowly Construed.*

One other argument offered by the respondent is that there is some special dispensation given to the states in interpreting their enabling acts which permits Arizona to disregard the language of this one.<sup>3</sup> Thus, it is alleged by respondent that "if the State of Oklahoma may flatly overrule the Congressional mandate in its Enabling Act that the state capital remain at Guthrie until 1913" Arizona need not give strict interpretation to its enabling act in relation to the trust lands. Brief of Respondent, p. 22. The reliance for the Guthrie episode is based on *Coyle v. Smith*, 221 U.S. 559, 31 Sup.Ct. 688, 55 L.Ed. 853 (1911). The decision in this case and others following it are interpreted to suggest that there is an area "of which the state itself has either primary or exclusive responsibility." Hence, we are told that while Arizona could not "completely dispense with the value requirement of its enabling act" it can interpret its act so as to modify the value standard. Brief of Respondent, pp. 21-22.<sup>4</sup> A corollary of this argument is that the State of Arizona, acting through its legislature and courts, is best able to determine how the value require-

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<sup>3</sup>We do not respond to respondent's argument that there is some contrary precedent created by a motion of the Department of Justice in a case in the Federal District Court because, with all respect, we find nothing in it which relates to this problem. The motion, set forth by Respondent's pages 42-43 of their Brief, is clearly based on sovereign immunity which, as we see it, does not appear to bear on the problem here involved.

<sup>4</sup>It will be recalled that New Mexico has interpreted the same act in the exactly opposite way from Arizona, *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 379, 301 P.2d 317 (1956). Respondent contends that such acts "should not be narrowly construed" and that the two conflicting decisions may stand side by side.

ments of the act may be most effectively administered. Brief of Respondent, pp. 6, 23.<sup>5</sup>

*Coyle v. Smith* contains no such implication; it is simply an equal footing case. See *Baker v. Carr*, 369 U.S. 186, 226 n. 53, 82 Sup. Ct. 691, 7 L.Ed. 2d 663 (1962); *Ex parte Webb*, 225 U.S. 302, 32 Sup. Ct. 769, 56 L.Ed. 1099 (1912). To even more clearly illustrate the limits of the holding of *Coyle v. Smith*, the opinion in the case itself expressly distinguished the situation then before the Court from a case like the present one. It stated:

"It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was

<sup>5</sup>This corollary, however, in assuming that this division of responsibility has not yet been determined, neglects the actualities of Arizona law. Ariz. Const. art. X, sec. 2, quoted at page 40 of Petitioner's opening brief, deems a breach of trust disposition of the lands in any manner contrary to the provisions of the Enabling Act. A.R.S. Sec. 37-102 (A) establishes a state land department to administer all laws relating to lands owned by, belonging to, and under the control of the state. The state land commissioner is empowered by A.R.S. Sec. 37-132 to exercise and perform all powers and duties vested in or imposed upon the state land department, and to lease or sell all land owned or held in trust by the state. Specific authority is given the land department by A.R.S. Sec. 37-461 to make rules and regulations respecting the granting and maintenance of rights of way and material sites. A regulation promulgated under this authority is at the core of the present suit. There thus can be no doubt that wherever the reservoir of state administrative power under the Enabling Act might have been vested as an original matter, existing Ariona law has vested it squarely in the State Land Department and Commissioner.

not plainly within the regulating power of Congress." (Emphasis added.) 31 Sup. Ct at 691.

In view of this carefully considered limiting of the holding in *Coyle v. Smith*, which expressly deals with the problem now before the Court, it is difficult to understand how the argument could be made that that holding extends to the present case.

The appropriate rule to be applied in construing the Enabling Act, rather, is that land grants made by governmental entities, including grants made to states, are to be narrowly construed.<sup>6</sup> But even more persuasive than this rule of construction is the Enabling Act itself, which expressly says that the appraised value must be paid for the land that is disposed of.

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<sup>6</sup>*Slidell v. Grandjean*, 111 U.S. 412, 4 Sup. Ct. 475 28 L.Ed. 321 (1883); *Blair v. Chicago*, 201 U.S. 400, 471, 26 Sup. Ct. 427, 50 L.Ed. 801 (1906); *Caldwell v. United States*, 250 U.S. 14, 39 Sup. Ct. 397, 63 L.Ed. 816 (1919); *Northern Pac. R. Co. v. United States*, 330 U.S. 248, 67 Sup. Ct. 747, 91 L.Ed. 876 (1947); *United States v. Union Pac. R. Co.*, 353 U.S. 112, 77 Sup. Ct. 685, 1 L.Ed. 2d 693 (1957).

**Conclusion**

The New Mexico-Arizona Enabling Act requires that the lands granted to the state be disposed of only upon receipt of the appraised value of the land so taken. The land was put in trust on this basis and Arizona accepted the trust. The decision of the supreme court of the state fails to honor that commitment. The regulation of the State Land Commissioner fully effectuates and implements the purposes of the trust. For these reasons, as well as the reasons discussed in Petitioner's opening brief, the decision of the court below should be reversed.

Respectfully submitted,

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**October, 1966**

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In the Supreme Court of the  
United States

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No. 84

OBED M. LASSEN, Commissioner, State Land  
Department, *Petitioner*,

v.

ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE STATE OF WASHINGTON AS  
AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE  
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BRIEF FOR THE STATE OF WASHINGTON AS  
AMICUS CURIAE

---

The State of Washington<sup>1</sup> files this brief as *amicus curiae* under sponsorship of its Attorney General pursuant to Rule 42(4), Rules of the Supreme Court.

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<sup>1</sup>The Superior Court of the State of Washington for Thurston County entered judgment on July 18, 1966, declaring invalid § 16, ch. 56, Washington Laws of 1965 because it authorized rent-free use of granted school and other trust lands by the state parks commission. *Cole v. Odegaard*, Cause No. 36798. (See *Brief of the State of Washington as Amicus Curiae on Petition for Writ of Certiorari*, p. 7.) The Washington State Parks and Recreation Commission has given notice of appeal from that judgment to the Washington Supreme Court and accordingly declines to join in this brief.

## OPINION BELOW

The opinion of the Supreme Court of Arizona in *State ex rel. Arizona Highway Dep't v. Lassen* (R. 33) is reported at 99 Ariz. 161, 407 P.2d 747.

This court granted the petition for a writ of certiorari on May 2, 1966. 384 U.S. 926.

## INTEREST OF THE STATE OF WASHINGTON

1. The State of Washington has received almost three million acres<sup>2</sup> of trust land under the terms of the Enabling Act admitting it to the Union, Act of Feb. 22, 1889 (25 Stat. 676), §§ 10-12, 14-18, as amended (printed as Appendix A, *infra*, pp. 19-26).

2. The Arizona decision concerning the Enabling Act of New Mexico and Arizona is contrary to the administrative determination of the same issue under Washington's Enabling Act. See the opinion of the state Attorney General, printed as Appendix A to the *Brief of the State of Washington as Amicus Curiae on Petition for Writ of Certiorari*, pp. 8-21.

3. The Arizona decision is contrary to the judicial determination of a similar issue under Washington's Enabling Act. On July 18, 1966, the Superior Court of the State of Washington for Thurston

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<sup>2</sup>Dep't of Natural Resources, State of Washington, *Third Biennial Report (Statistical Supplement)* 49 (1963).

<sup>3</sup>Washington's Enabling Act is also the act of admission for the states of North Dakota, South Dakota, and Montana.

County entered judgment in *Cole v. Odegaard*, Cause No. 36798, declaring invalid the following provision of chapter 56, Washington Laws of 1965:

Sec. 16. State lands used by the state parks commission as public parks shall be rent free. because it violated Washington's Enabling Act and the companion provisions of the Washington Constitution, art. 16, §§ 1, 2 (printed as Appendix B, *infra*, pp. 26-27). The court ruled that granted school and other trust lands may not be put to state park use without compensation to the trust for which the lands are held. The case is now before the Washington Supreme Court, Cause No. 39133, on appeal of the defendant State Parks and Recreation Commission.\*

4. The Arizona decision is contrary to the position of the State of Washington in litigation now pending in the United States District Court for the Eastern District of Washington, Northern Division, Civil No. 2619, *United States v. 111.2 Acres of Land*, wherein the state contends that the full market value of an easement in school lands must be ascertained and paid (or safely secured) to the state for the benefit of the common schools before Rev. Code Wash. § 90.40.050 operates to grant that easement to the United States. The state bases its claim on the Washington Enabling Act, §§ 10 and 11 (as amended), Appendix A, *infra*, pp. 19-23, and the companion provisions of the Washington Constitution, art. 16, § 1, Appendix B, *infra*, pp. 26-27.

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\*See footnote 1, *supra*.

## ARGUMENT

### *Introduction and Summary*

New Mexico and Arizona have come to opposite conclusions about their obligation to make compensation for public use of lands granted to them by the federal government under the New Mexico-Arizona Enabling Act.<sup>5</sup> New Mexico holds that the lands may not be diverted from trust purposes without compensation, even for public use, while Arizona holds to the contrary. (Compare *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), with *State ex rel. Arizona Highway Dep't v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965).) The disagreement arises, at least in part, because the New Mexico-Arizona Enabling Act is silent about the whole matter of putting trust lands to public use.

The resolution of the difference between New Mexico and Arizona is of importance to all western states because all have been the recipients of federal land grants dedicated by Congress in trust for schools and other public institutions. The State of Washington and its sister states of North Dakota, South Dakota, and Montana, for example, received land grants similar to those received by New Mexico and Arizona. See Act of Feb. 22, 1889, 25 Stat. 676, Appendix A, *infra*, pp. 19-26.

A review of the Enabling Act of Washington and her sister states establishes two principles we

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<sup>5</sup>Act of June 20, 1910, 36 Stat. 557.

believe are equally applicable to the New Mexico-Arizona Enabling Act:

1. Congress' silence about diverting trust lands to public use means that the lands can be diverted only by exercise of the power of eminent domain, whether the diversion be by the state or by the federal government.
2. The law of eminent domain furnishes the standard to measure the damages to the trust fund for which the lands are held. That standard is the "just compensation" of the Fifth and Fourteenth Amendments to the United States Constitution.\*

### *Eminent Domain and Trust Lands*

#### I

As originally enacted, the Washington Enabling Act was silent about procedure whereby public use could be made of granted lands. The general authority for disposal of the lands was set forth in section 11 (25 Stat. at 679) as follows:

That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands, may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not ex-

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\*Of course a state may set a higher standard of compensation for itself if it so chooses, as Arizona has apparently done by its rule limiting the offset of special benefits. See Ariz. Rev. Stat. § 12-1122, and *Brief for the United States as Amicus Curiae*, p. 18 n.11.

ceeding one section to any one person or company; \*

Nonetheless, from the beginning Washington rejected the contention that these restrictions were a limitation of the state's inherent power of eminent domain. *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25 (1911); *Tacoma v. State*, 121 Wash. 448, 209 Pac. 700 (1922).<sup>1</sup> But in taking the position it did, Washington found itself at odds with the Montana view of the same Enabling Act provisions. In *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910), the Montana Supreme Court expressly held that Congress, in making its land grants, intended to divest the state of its power of eminent domain over the granted lands.

On principle it seems clear that the Montana position was wrong. As the Idaho Supreme Court said about that state's granted school lands, *Hollister v. State*, 9 Ida. 8, 71 Pac. 541, 543 (1903):

But even if congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe

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<sup>1</sup>The rule of these cases remains the Washington law of today. See *Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126 (1959).

that congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.

The weight of authority is against the Montana decision. So far as we can ascertain, all states save North Dakota (see, *infra*, p. 12 n.11), have construed federal land grants in accordance with the Washington-Idaho position.\* The federal courts have rejected the Montana decision, *United States v. Montana*, 134 F.2d 194 (9th Cir.), cert. denied, 319 U.S. 772 (1943), and uniformly hold that federal land grant legislation no more limits the United States' power of eminent domain than it does the states'. E.g., *United States v. 40 Acres*, 24 F. Supp. 390 (E.D. Ida. 1938); *United States v. 2715.98 Acres of Land*, 44 F. Supp. 683 (W.D. Wash. 1942).

## II

The disagreement of Washington and Montana over the effect of their common Enabling Act did serve a useful purpose. The conflict justified a re-

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\*See *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Ida. 695, 151 Pac. 998, 1001 (1915); *Ross v. Trustees of University*, 30 Wyo. 433, 222 Pac. 3, on rehearing 31 Wyo. 464, 228 Pac. 642 (1924); *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938); *State v. Platte Valley Power & Irrigation Dist.*, 143 Neb. 861, 10 N.W.2d 831 (1943); *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 374, 301 F.2d 317 (1956).

view of the matter by Congress, and Congress permanently set the matter at rest by expressly adopting the Washington view that Enabling Act provisions do not limit a state's power of eminent domain. Amendments in 1921<sup>10</sup> and 1932<sup>11</sup> added the following provisions to section 11:<sup>12</sup>

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

Under this provision each state is left free as to the *manner* in which it will exercise its power of eminent domain. It may be exercised in court, of course, but it may also be exercised outside of court in administrative proceedings. The out-of-court exercise of the power has long been a part of Washington law. *E.g., State ex rel. Washington Water Power Co. v. Savidge*, 75 Wash. 116, 134 Pac. 680 (1913); *State ex rel. Polson Logging Co. v. Superior*

<sup>10</sup>Act of Aug. 11, 1921, 42 Stat. 158.

<sup>11</sup>Act of May 7, 1932, 47 Stat. 150.

<sup>12</sup>The North Dakota Supreme Court overlooked the amendment to § 11 in 1941 when it decided *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941), on the authority of *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910).

*Court*, 11 Wn.2d 545, 119 P.2d 694 (1941). It is an exception to this state's preference for in-court proceedings, Wash. Const. amend. 9, made possible by the state constitution's silence about condemnation of state-owned property. *State ex rel. Mason County Power Co. v. Superior Court*, 99 Wash. 496, 169 Pac. 994 (1918).

### III

By the amendments to the common Enabling Act of Washington, North Dakota, South Dakota, and Montana, Congress has corrected any inference that granted trust lands are not subject to a state's inherent power of eminent domain. This clear expression of congressional intent is entitled to considerable weight outside the four states directly involved. The same congressional policy to promote education in Washington and her sister states, *Johanson v. Washington*, 190 U.S. 179, 183 (1903), underlies the land grants made to other states, including New Mexico and Arizona, *Brief for the United States as Amicus Curiae*, pp. 7-10, and *Brief of Petitioner*, pp. 19-26.

#### *Compensation for Non-Trust Use of Granted Lands*

When Congress made its land grants to the newly formed states of the west, it might have made grants unrestricted as to purpose. U. S. Const. art. 4, § 3, cl. 2; cf. *Alabama v. Texas*, 374 U.S. 272 (1954). But Congress did not choose to do so. Instead, Congress specified the particular objects of its bounty

and made its land grants in trust for those purposes. That choice was also within its power. *Ibid.* Thus the fundamental issue in this case reduces itself to this: What does federal law require as the minimum standard or measure of compensation when a state exercises its power of eminent domain to extinguish the trust as to particular granted lands?

Whether the issue be answered on theoretical grounds or merely practical grounds, we believe that the minimum standard of compensation must be the "just compensation" of the Fifth and Fourteenth Amendments to the United States Constitution.

## I

If we approach the matter on a theoretical basis, the just compensation rule has the obvious merit of comporting with congressional intent. Congress, as we have seen, had no intention of immunizing its land grants from state condemnation power. A state may therefore extinguish federally created rights in trust lands and in its beneficiaries by exercise of state eminent domain power. However, any exercise of this power by a state is subject to the due process clause of the Fourteenth Amendment which imposes an obligation to pay "just compensation" similar to that required of the United States by the Fifth Amendment.<sup>12</sup> *E.g., Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897); *Appleby*

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<sup>12</sup>State-owned property is "private property" under the Fifth Amendment. See, e.g., *St. Louis v. Western Union*, 148 U.S. 92, 100-101 (1893); *United States v. Carmack*, 329 U.S. 230, 242 (1946). By analogy, federally created rights in the beneficiaries of granted lands are "private property" under the Fourteenth Amendment.

*v. Buffalo*, 221 U.S. 524 (1911); *Olson v. United States*, 292 U.S. 246, 254 (1934); *West v. Chesapeake & P. Tel. Co.*, 295 U.S. 662, 671 (1935).

If the funds for which granted lands are held in trust receive "just compensation" these funds receive the equivalent of what they would have received if the lands had been sold by the usual public sale, *cf. Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25 (1911), and the policy behind the federal land grants is achieved.

For an express statement of congressional intent on this point, we must again turn to the Enabling Act of Washington and her sister states of North Dakota, South Dakota, and Montana. In 1932 Congress amended section 11 and for the first time prescribed a standard of compensation for the state that chooses to devote trust lands to non-trust public use. That amendment<sup>13</sup> provided:

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however*, That none of such lands nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, or unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

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<sup>13</sup>Act of May 7, 1932, 47 Stat. 150.

The standard of compensation is taken almost word for word from section 1, article 16, of the Washington Constitution (Appendix B, *infra*, p. 26). It was thus a standard which had already received prior judicial consideration. In 1911 the Washington Supreme Court held that a condemnation award for the taking of a street easement satisfied the "full market value" requirement of the constitutional provision. *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25 (1911).

## II

As a practical matter, the federal just compensation rule is the only measure for compensation that can be conveniently administered as a minimum federal standard when a state condemns granted trust lands and thereby appropriates them to necessary but non-trust use.

*First*, the convenience of this court will be served by the adoption of the Fifth and Fourteenth Amendment just compensation rule. This is a ready-made body of law with which all courts and lawyers are presently familiar. By its adoption the court will therefore avoid the necessity of fashioning a substitute body of law on a time-consuming, case by case basis.

*Second*, adoption of the just compensation rule will serve the convenience of the affected states by making the compensation rule governing condemnations by the United States applicable to an exercise of the state's power of eminent domain over the same lands.

Under present law the United States pays just compensation to the states when it takes school and other granted trust lands by condemnation. *E.g., Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947); *United States v. Montana*, 134 F.2d 194 (9th Cir.), cert. denied, 319 U.S. 772 (1943); *United States v. 2902 Acres of Land*, 49 F. Supp. 595 (D. Wyo. 1943); *United States v. 2715.98 Acres of Land*, 44 F. Supp. 683 (W.D. Wash. 1942); *United States v. 40 Acres*, 24 F. Supp. 390 (E.D. Ida. 1938). It does so because state-owned lands are deemed "private property" within the meaning of the Fifth Amendment when the United States takes them for public use. *St. Louis v. Western Union*, 148 U.S. 92, 100-101 (1893); *Wayne County v. United States*, 53 Ct. Cl. 417 (1918), aff'd, 252 U.S. 574 (1920); *United States v. Carmack*, 329 U.S. 230, 242 (1946).

The convenience of the states will be served by one federal rule governing appropriations by the federal government and appropriations by the state itself. This is so because the state's title to granted lands is that of a trustee. Therefore, every time granted lands are appropriated for public use the state's interests as trustee conflict with its interests as condemnor. Resolution of the conflict by reference to an external measure of damages eases this internal conflict.

*Third*, adoption of the federal just compensation rule will implement congressional policy. Under the Fifth and Fourteenth Amendments just com-

pensation implies a full and complete equivalent, usually monetary, for the loss sustained by the owner whose land has been taken or damaged. 1 Nichols, *Eminent Domain* § 8.6 (1965). It means compensation just to the condemnor and to the condemnee. *Id.*, § 8.6[1]. Therefore utilization of the rule will assure the funds for which trust lands are held (owners, in a sense) of the full market value of the property lost to it, which was after all the ultimate purpose of Congress when it made its grants to the states.

### III

The fixing of a minimum federal standard in no way detracts from a state's right to make compensation at a higher standard in accordance with its local law of eminent domain. If Arizona, for example, has done this by enactment of a rule limiting the offset of special benefits, see Ariz. Rev. Stat. § 11-1122,<sup>14</sup> there can be no federal objection to such a rule. Similarly there can be no federal objection to a Nebraska rule, see *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), disregarding encumbrances when compensation is fixed for the condemnation of trust lands under authority of Nebraska law.

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<sup>14</sup>See, also, *Brief for the United States as Amicus Curiae*, p. 18, n.11.

## CONCLUSION

The judgment of the court below should be reversed and the case remanded.

Respectfully submitted,

JOHN J. O'CONNELL,  
*Attorney General,*

HAROLD T. HARTINGER,  
*Assistant Attorney General,*  
*Attorneys for the State of*  
*Washington as Amicus Curiae.*

October, 1966.

## APPENDIX A

Act of February 22, 1889, ch. 180, 26 Stat. 676 (the Enabling Act of Washington, North Dakota, South Dakota, and Montana).

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*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.*

\* \* \*

Sec. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have

been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of the common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Sec. 11.<sup>15</sup> That all lands granted by this Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such

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<sup>15</sup>As amended by Act of August 11, 1921, 42 Stat. 158; Act of May 7, 1932, 47 Stat. 150; Act of June 25, 1938, 52 Stat. 1198; Act of April 13, 1948, 62 Stat. 170; Act of June 28, 1952, 66 Stat. 283; and Act of May 31, 1962, 76 Stat. 91.

exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for the exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective States; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years..

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and

from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted, except that proceeds from the sale and other permanent disposition of the two hundred thousand acres granted to the State of Washington for State charitable, educational, penal, and reformatory institutions may be used by such State for the construction of any such institution. Rentals on leased land, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds. Notwithstanding the foregoing provisions of this section, each of the states of North Dakota, South Dakota, and Washington may pool the moneys received by it from oil and gas and other mineral leasing of said lands. The moneys so pooled shall be apportioned among the public schools and the various State institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted by this Act. Not less than 50 per centum of

such amount shall be covered into the appropriate permanent fund.

The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.

Sec. 12.<sup>16</sup> That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of unappropriated public lands within such States, to be selected and located in legal subdivisions as provided in section 10 of this Act, shall be, and are hereby, granted to said States for public buildings at the capital of said States for legislative, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes.

\* \* \*

Sec. 14. \* \* \* And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four,

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<sup>16</sup>As amended by Act of Feb. 26, 1957, 71 Stat. 5.

will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section 11 of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. \* \* \*

Sec. 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby, granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota, for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. \* \* \*

Sec. 16. That ninety thousand acres of land, to be selected and located as provided in section ten of

this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

Sec. 17. That in lieu of the grant of lands for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to-wit:

\* \* \*

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

Sec. 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said States, in lieu thereof, for the use and the benefit of the common schools of said States.

\* \* \*

#### APPENDIX B

Washington Constitution, article 16, sections 1 and 2.

#### SCHOOL AND GRANTED LANDS

§ 1. *Disposition of.* All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest is disposed of, to be ascer-

tained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

*§ 2. Manner and Terms of Sale.* None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder, the value thereof, less the improvements shall, before any sale, be appraised by a board of appraisers to be provided by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of the improvements thereon shall be excluded: Provided, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners when the purchase price has been paid in good faith, may be confirmed by the legislature.

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In the Supreme Court of the  
United States  
OCTOBER TERM, 1966

No. 84

OBED M. LASSEN, Commissioner, State Land  
Department, *Petitioner*,

v.

ARIZONA EX REL. ARIZONA HIGHWAY DEPARTMENT,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE WASHINGTON PARKS AND  
RECREATION COMMISSION AS AMICUS CURIAE

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BRIEF FOR THE WASHINGTON PARKS AND  
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The Washington Parks and Recreation Commission files this brief as *amicus curiae* under sponsorship of its Attorney General pursuant to Rule 42(4), and in compliance with Rule 42(5), Rules of the Supreme Court.

INTEREST OF THE WASHINGTON PARKS  
AND RECREATION COMMISSION

The Washington Parks and Recreation Commission uses trust lands acquired pursuant to Washington's Enabling Act (substantially similar to the

Arizona Enabling Act presently before this Court) in twenty-six state parks. The Washington legislature has encouraged the use of trust lands for state parks over a long period of time and prior to 1965 provided that "a yearly reasonable rental" should be paid for such lands by the Parks and Recreation Commission to the Commissioner of Public Lands. By section 16, chapter 56, Laws of 1965, however, the Washington legislature provided:

"State lands used by the state parks commission as public parks shall be rent free."

The above provision was challenged by the Washington Commissioner of Public Lands as being in violation of the Washington Constitution and Enabling Act. A ruling by the Superior Court of the State of Washington for Thurston County that trust lands may not be put to park use without compensation to the trust is now being appealed by the Washington Parks and Recreation Commission to the State Supreme Court.

## ARGUMENT

A reading of the briefs filed by the petitioner, respondent, the United States, and the Attorney General of the State of Washington, suggests that all parties agree that the Enabling Act prohibits substantial damage to the trust without compensation. The difference between the parties relates more to procedure than to substance, i.e., which rule should be used to determine whether there is damage to the

trust and, if there is damage, measure the amount of compensation due the trust. Four possible rules have in effect been offered to the Court:

1. Compensation to the trust based on traditional condemnation principles excluding general benefits accruing to the trust lands as a whole from the proposed public use, and requiring payment of the appraised fair market value of the specific parcels of land taken. (This is the rule suggested by the Arizona Land Commissioner and by the Washington Land Commissioner through the Washington Attorney General, and it rests on an irrebuttable presumption that public use of trust lands for highways in Arizona always lessens the value of the trust or at least lessens the value of the trust lands adjoining the parcel taken.)

2. Compensation to the trust based on the appraised fair market value of the particular parcel taken with the provision that such amount may be offset by general benefits to the trust lands as a whole. (This is the rule suggested by the United States and it apparently sets up a rebuttable presumption that a public use diminishes the value of the trust lands.)

3. No compensation to the trust unless it can be shown that the appraised fair market value of the parcel taken and the damages to the rest of the trust lands exceed the general benefit to the trust lands as a whole. (This rule, which would create a rebuttable presumption that a public use of trust lands enhances the value of trust lands as a whole, is some-

what similar to the position taken in a case extensively relied on by the Arizona court—*Ross v. Trustees of University of Wyoming*, 31 Wyo. 464, 477, 228 Pac. 642, 647, on rehearing (1924). There the Wyoming court established the presumption that highways generally enhance the value of the trust but allowed that substantial injury to the trust might be shown in particular cases.)

4. No compensation to the trust in any case where the state court (or legislature) finds that the particular public use confers general benefits on the trust lands as a whole so great as to outweigh any possible compensation for damage to the trust. (This is the rule suggested by the Arizona Highway Department and the Arizona Supreme Court and it rests on an irrebuttable presumption that public use of trust lands for highways in Arizona always enhances the value of trust lands as a whole.)

The Washington Parks and Recreation Commission believes that the State of Arizona is not required by the Enabling Act to adopt any particular one of the above rules. The first rule, the Arizona and Washington Land Commissioners suggest, is required of the states because of state constitutional and enabling act provisions restricting disposition of trust lands. We fail to see how there is any disposition (or even a part of a disposition) in the transferring of state land from one agency to another. A state is one entity, and the land commissioner, the highway department, and the parks and recreation

commission are all part of that one entity. Therefore, it follows that when the legislature of a particular state gives a highway department, a parks and recreation commission, or any other state agency the use of trust lands, the state does not dispose of any interest. The state loses nothing. The state gains nothing. All that takes place is a shift of management functions between different state agencies, and a shift in the use of a portion of the land.

We can find no evidence that the drafters of either the Arizona or Washington Constitutions, or the Enabling Acts applying to the two states, ever envisioned prohibiting the shifting of trust lands from one state agency to another so as to discourage multiple use of an abundant and valuable state resource. Rather, in restricting disposals, they were concerned with prohibiting possible giveaways of trust lands to non-state entities, such as private corporations.

Assuming that the legislatures or courts of the various western states are not required to adopt rule 1 listed above, then the state legislatures and courts may adopt any one of the four rules listed above (or perhaps a different rule) so long as the rule adequately protects the trust against damage. In other words, the crucial question becomes whether the proposed public use damages or benefits the trust. This is a difficult question which will vary depending on the public use contemplated. In some cases, general benefits will be so clear and so large that rule 4

listed above may be quite reasonable. In other cases where the benefits are less and the damages greater, rules 2 or 3 above may be more suitable. And in cases where the state legislatures or courts feel the general benefits are of such a small nature (or do not merit any consideration), rule 1 above may be adopted.

The Court should not undertake the responsibility of deciding which of the above rules should apply in any particular state to any particular public use of trust lands. To do so will result: (1) in the Court involving itself in difficult factual questions better left to lower state courts; and (2) in the Court facing an increasing number of cases from western states where multiple public use of trust lands is gaining greater acceptance. Neither do we believe that the Court should overturn a determination by a state court or legislature to adopt any of the above rules, unless it can be shown that the rule in question was not arrived at in a manner reasonably designed to protect the trust against damage.

This leads us to our sole reservation about the Arizona court's decision: the lack of a record supporting the Arizona court's determination that use of trust lands for highways so greatly enhances the value of trust lands as a whole as to preclude the possibility of compensation for a particular parcel. We are confident that there is ample factual evidence upon which such determination could be based; and respondent in page 27 and pages following in its

brief suggests such evidence. Nonetheless, the Arizona Supreme Court did not refer to any such evidence. We suggest that if the Court doubts the Arizona rule is reasonably designed to protect the trust against damage, the Court should remand the case to the Arizona Supreme Court with instructions that the Arizona court undertake on its own or through a lower court the gathering of evidence on the question of just how greatly the use of trust lands for state highways enhances the value of the trust.

#### CONCLUSION

The judgment below should be affirmed, or in the alternative, remanded to allow the Arizona Supreme Court to develop a more complete factual basis for its decision.

Respectfully submitted,  
**JOHN J. O'CONNELL,**  
Attorney General,

**JOHN R. MILLER,**  
Assistant Attorney General,

*Attorneys for the Washington Parks  
and Recreation Commission  
as Amicus Curiae.*

October, 1966.

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# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1966.

Obed M. Lassen, Commissioner,  
State Land Department,  
Petitioner,  
*v.*

Arizona ex rel. Arizona Highway  
Department.

On Writ of Certiorari  
to the Supreme Court  
of Arizona.

[January 10, 1967.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

This action was brought as an original proceeding in the Supreme Court of Arizona by the State on the relation of its Highway Department. The Department seeks to prohibit the application by the State Land Commissioner of rules governing the acquisition of rights of way and material sites in federally donated lands held in trust by the State.<sup>1</sup> The Commissioner's rules provide in pertinent part that "Rights of Way and Material Sites may be granted . . . for an indefinite period . . . after full payment of the appraised value . . . has been made to the State Land Department. The appraised value . . . shall be determined in accordance with the principles established in A. R. S. 12-1122." Rule 12. The Supreme Court of Arizona held that it may be conclusively pre-

<sup>1</sup> This action is in form and substance a controversy between two agencies of the State of Arizona, both formally represented by the State's Attorney General. We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause. He is essentially the trustee of the trust at issue here, with custody of the trust lands. In addition, both the Commissioner and the Department are represented by special counsel appointed by the Attorney General to advocate the divergent positions of the parties.

sumed that highways constructed across trust lands always enhance the value of the remaining trust lands in amounts at least equal to the value of the areas taken. It therefore ordered the Commissioner to grant without actual compensation material sites and rights of way upon trust lands. 99 Ariz. 161, 407 P. 2d 747.

The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State.<sup>2</sup> The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union.<sup>3</sup> Although the terms of these grants differ, at least the most recent commonly make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms.<sup>4</sup> We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands.<sup>5</sup> 384 U. S. 926.

<sup>2</sup> The grants consisted of four sections in each township for the support of common schools, plus specified acreages for other designated purposes. The other acreages were granted for the support of agricultural and mechanical colleges, a school of mines, military institutes, the payment of bonds, miners' hospitals, penitentiaries, and similar purposes. Of the 10,790,000 acres granted to Arizona for all designated uses, some 9,180,000 acres were earmarked for various educational purposes.

<sup>3</sup> Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools. The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963).

<sup>4</sup> 36 Stat. 557, 575.

<sup>5</sup> Nine States urged as *amici curiae* that we review the judgment below. One of the nine, New Mexico, received lands in trust under

The issues here stem chiefly from ambiguities in the grant itself. The terms under which the United States provided these lands were included in the New Mexico-Arizona Enabling Act. 36 Stat. 557. The Act describes with particularity the disposition Arizona may make of the lands and of the funds derived from them, but it does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant. Of the issues which may arise from the Act's silence, we need now reach only two: first, is Arizona permitted to obtain trust lands for such uses without first satisfying the Act's restrictions on disposition of the land; and second, what standard of compensation must Arizona employ to recompense the trust for the land it uses. Both issues require consideration of the Act's language and history.

## I.

We turn first to the question of the method by which Arizona may obtain trust lands for purposes not included in the grant. The constraints imposed by the Act upon the methods by which trust lands may be transferred are few and simple. Section 28, which is reproduced in the Appendix to this opinion, requires, with exceptions inapplicable here, that lands be sold or leased only to "the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands . . . shall lie . . ." The section prescribes the terms, form and frequency of the notice which must be given of the auction. It requires that no lands be sold for a price less than their appraised value. The Act imposes two sanctions upon transactions which

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the very grant in issue here. The Supreme Court of New Mexico has held in closely similar circumstances that actual compensation must be paid to the trust. *State v. Walker*, 61 N. M. 374, 301 P. 2d 317.

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fail to satisfy its requirements. First, § 28 provides broadly that trust lands must be "disposed of in whole or in part only in manner as herein provided . . ." It adds that "Disposition of any of said lands . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust." Finally, it provides that "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed . . . not made in substantial conformity with the provisions of this Act shall be null and void . . ."

The parties urge, and the state court assumed, that Arizona need not follow these procedures when it seeks material sites and rights of way upon trust lands.<sup>1</sup> The Commissioner's rules thus do not require an auction or other public sale. This view has been taken by other state courts construing similar grants. *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433; 222 P. 3, *State v. Walker*, 61 N. M. 374, 301 P. 2d. 317. We have concluded, for the reasons which follow, that the restrictions of the Act are inapplicable to acquisitions by the State for its highway program.

The Act's silence obliges us to examine its purposes, as evidenced by its terms and its legislative history, to determine whether these restrictions should be imposed here. The grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act. It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes.

<sup>1</sup> In addition, the court suggested that the restrictions of the Enabling Act are inapplicable here because the State obtains less than a fee interest. This contention is plainly foreclosed by the language of § 28, by which "Every sale, lease, conveyance, or contract of or concerning any of the lands" is void unless in substantial conformity with the Act.

Congress could scarcely have expected, for example, that many of the 8,000,000 acres of its grant "for the support of common schools," all chosen without regard to topography or school needs, would be employed as building sites.<sup>1</sup> It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.

The central problem which confronted the Act's draftsmen was therefore to devise constraints which would assure that the trust received in full fair compensation for trust lands. The method of transfer and the transferee were material only so far as necessary to assure that the trust sought and obtained appropriate compensation. This is confirmed by the legislative history of the Enabling Act. All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories.<sup>2</sup> Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898.<sup>3</sup> The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depreda-

<sup>1</sup> The school lands were granted according to the rigid checkerboard pattern of the federal survey. Four sections per township were granted by number for the support of common schools, instead of the one section per township ordinarily given in the earlier grants, because the unappropriated lands in Arizona and New Mexico were largely of so little value. Orfield, *Federal Land Grants to the States* 45.

<sup>2</sup> S. Rep. No. 454, 61st Cong., 2d Sess., 18.

<sup>3</sup> Remarks of Senator Beveridge, 45 Cong. Rec. 8227.

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tions here by requiring public notice and sale.<sup>18</sup> The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands. We see no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation.

Further, we should not fail to recognize that, were we to require Arizona to follow precisely these procedures, we would sanction an empty formality. There would not often be others to bid for the material sites and rights of way which the State might seek. More important, even if such bidders appeared and proved successful, nothing in the grant would prevent Arizona from thereafter condemning the land which it had failed to purchase; the anticipation of condemnation would leave the auction without any real significance. We cannot see that the trust would materially benefit from this circuitry.

We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question the transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The State may instead employ the procedures established by the Commissioner's

<sup>18</sup> *Ibid.* These violations culminated in a series of law suits brought by the Department of Justice against those privy to them. These lawsuits were pending when the Enabling Act was under study by Congress. The importance of this episode is also indicated in the committee's report. S. Rep. No. 454, 61st Cong., 2d Sess., 19-20.

rules, or any other procedures reasonably calculated to assure the integrity of the trust and to prevent misapplication of its lands and funds.

## II.

The second issue here is the standard of compensation which Arizona must employ to recompense the trust for the land it acquires. The Land Commissioner's rules provide simply that the State must pay the appraised value, as measured by the State's condemnation statute, of the right of way or material site. The Highway Department urges, and the Arizona Supreme Court held, that nothing need ever be actually paid since it may be conclusively presumed that all highways enhance the value of the remaining trust lands in amounts at least equal to the value of the lands which were taken. The United States, as *amicus curiae*, suggests that the Highway Department be obliged to pay the land's appraised value, but that it be permitted to reduce that sum by the amount of any enhancement shown in the value of the remaining trust lands. The rule urged by the United States differs from that adopted by the state court only in that the United States would not permit the Highway Department to presume enhancement, but would instead require that it be established by the Department in each instance with reasonable certainty and precision. Under this rule, enhancement would have to be individually proved and computed for small tracts of land checkered over the entire State.

We are urged by the United States to determine only the validity of the rule of law stated by the Arizona Supreme Court, and to defer the broader question of whether enhancement may ever be permitted to diminish the actual compensation payable to the trust. The United States emphasizes that the broader issue does not directly arise under the Commissioner's rules, since the

Arizona condemnation statute incorporated by those rules does not permit benefits to reduce the compensation payable for the condemned land's fair market value.<sup>11</sup> We are unable to take so narrow a view. The rule adopted by the state court clearly stemmed from, and depended upon, the premise that enhancement may be balanced against the value of the trust lands taken by the State. If we severed the conclusion from its premise, we would halt short of a full adjudication of the validity of the Commissioner's rules, and unnecessarily prolong the litigation of this important question. We have therefore reached the broader issue, and have concluded that the terms and purposes of the grant do not permit Arizona to diminish the actual compensation, meaning thereby monetary compensation, payable to the trust by the amount of any enhancement in the value of the remaining trust lands.

The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it, and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value," and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained . . ." <sup>12</sup> The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum.<sup>13</sup> Second, it imposes a series of careful restric-

<sup>11</sup> A. R. S. § 12-1122. The statute permits benefits to reduce any damages caused by severance to the uncondemned portions of a parcel of land, but not to reduce the compensation paid for the land which is condemned.

<sup>12</sup> 36 Stat. 557, 574.

<sup>13</sup> *Ibid.* The Act fixed minimum prices of \$3 per acre in Arizona. This requirement was removed by the Act of June 5, 1936. 49 Stat. 1477. The Act still requires that land "susceptible of irrigation"

tions upon the use of trust funds. As this Court has noted, the Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." *Ervien v. United States*, 251 U. S. 41, 47. The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived"<sup>14</sup> from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." *United States v. Ervien*, 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries, and that only those beneficiaries profit from the trust.

This is confirmed by the background and legislative history of the Enabling Act. The restrictions placed upon land grants to the States became steadily more rigid and specific in the 50 years prior to this Act, as Congress sought to require prudent management and thereby to preserve the usefulness of the grants for their intended purposes.<sup>15</sup> The Senate Committee on the Territories, with the assistance of the Department of Justice,<sup>16</sup> adopted for the Arizona-New Mexico Act the most satisfactory of the restrictions contained in the earlier grants. Its premise was that the grants cannot "be too

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under federal or other projects not be sold for less than \$25 per acre. 36 Stat. 557, 574.

<sup>14</sup> 36 Stat. 557, 574.

<sup>15</sup> Orfield, *Federal Land Grants to the States* 48-52.

<sup>16</sup> S. Rep. No. 454, 61st Cong., 2d Sess., 20.

carefully safeguarded for the purpose for which they are appropriated."<sup>11</sup> Senator Beveridge described the restrictions as "quite the most important item" in the Enabling Act, and emphasized that his committee believed that "we are giving the lands to the States for specific purposes, and that restrictions should be thrown around it which would assure its being used for those purposes."<sup>12</sup>

Nothing in these restrictions is explicitly addressed to acquisitions by the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries "derive the full benefit"<sup>13</sup> of the grant. The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of that purpose, particularly in the context of lands that are as variegated and far flung as those comprised in this grant. And we think that the more particularized showing of enhancement advocated by the United States, resting as it largely would upon the forecasts of experts which by nature are subject to the imponderables and hazards of the future, also falls short of assuring accomplishment of the basic intendment of Congress. Acceptance of either of these courses for reimbursing the trust in these circumstances might well result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the State's highway program.<sup>14</sup>

<sup>11</sup> *Ibid.*

<sup>12</sup> Remarks of Senator Beveridge, 45 Cong. Rec. 8227.

<sup>13</sup> Letter from former Secretary of the Interior Garfield to the House Committee on the Territories. H. R. Rep. No. 152, 61st Cong., 2d Sess., 3.

<sup>14</sup> Despite widespread use of the value of benefits in computing condemnation awards, the various rules adopted for that purpose

We hold therefore that Arizona must actually compensate the trust in money<sup>21</sup> for the full appraised value of any material sites or rights of way which it obtains on or over trust lands.<sup>22</sup> This standard most nearly reproduces the results of the auction prescribed by the Act, and most consistently reflects the essential purposes of the grant.

The judgment of the Supreme Court of Arizona is accordingly reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

have created confusion and difficulties. See Haar and Hering, *The Determination of Benefits in Land Acquisition*, 51 Cal. L. Rev. 833. These problems would be aggravated in the context of this situation, since the benefits would have to be individually computed for tracts of land scattered over the entire State.

<sup>21</sup> We do not mean to suggest that deferred payment arrangements might not be appropriate. Cf. the provisions of § 28 (see Appendix): "no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid." Nor do we mean that exchanges, in the situations in which they are permitted by the Act, would not be appropriate. Cf. the provisions of § 28 (see Appendix): "The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder."

<sup>22</sup> We are informed by counsel that over a period of years Arizona has obtained the use of large areas of trust lands on bases that may not have accorded with those set forth in this opinion. We wish to make it plain that we do not reach either the validity of any such transfers or the obligations of the State, if any, with respect thereto.

APPENDIX.

SECTION 28 OF NEW MEXICO-ARIZONA  
ENABLING ACT, AS AMENDED.

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published

nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be produced therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admis-

sion of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.